DOCKET

No. 88-454-CFY
Status: GRANTED

Title: United States, Petitioner
v.
Peter Monsanto

Docketed:
September 14, 1988

Court: United States Court of Appeals
for the Second Circuit

See also:
87-1729

Counsel for petitioner: Solicitor General

Counsel for respondent: Chikofsky,Edward M., Liman,Arthur L.

Entry	Date	Note	Proceedings and Orders
1	Aug 19 1988	G	Application (A88-155) to extend the time to file a petition for a writ of certiorari from August 30, 1988 to September 14, 1988, submitted to Justice Marshall.
2	Aug 24 1988		Application (A88-155) granted by Justice Marshall extending the time to file until September 14, 1988.
3	Sep 14 1988	G	Petition for writ of certiorari filed.
4	Oct 14 1988		Brief of respondent Peter Monsanto in opposition filed.
5	Oct 14 1988	G	Motion of respondent for leave to proceed in forma pauperis filed.
6	Oct 19 1988		DISTRIBUTED. November 4, 1988
7	Nov 7 1988		Motion of respondent for leave to proceed in forma pauperis GRANTED.
8	Nov 7 1988		Petition GRANTED. The case is set for oral argument in tandem with No. 87-1729, Caplin & Drysdale, Chartered v. United States.
			**********
9	Dec 5 1988		The opening brief will be filed by respondent Peter Monsanto and the closing brief will be filed by the petitioner United States. A reply brief, if any, will be filed by the respondent Peter Monsanto.
11	Dec 15 1988		Order extending time to file brief of petitioner on the merits until January 5, 1989.
12	Dec 22 1988	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
17	Dec 26 1988	D	Application (A88-526) by Respondent to file a in excess of page limits, submitted to Justice Marshall.
13	Dec 30 1988		Record filed.
		*	Certified copy of original record and proceedings, box, received.
14	Dec 30 1988		The application to file a consolidated amici curiae brief in excess of the page limitation granted by the Chief Justice. The brief may not exceed 50 pages. (See 87-1729)
15	Jan 5 1989		Brief amici curiae of Committees on Criminal Advocacy and Criminal Law filed.
18	Jan 5 1989		Application (A88-526) denied by Justice Marshall.
19	Jan 5 1989		Brief amicus curiae of American Bar Association filed. VIDED.
16	Jan 9 1989		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
20	Jan 9 1989		Brief of respondent Peter Monsanto filed.
21	Jan 25 1989	D	Motion of Committee on Criminal Advocacy, et al. for

No. 88-454-CFY

Entry	Date	Note	Proceedings and Orders
			leave to participate in oral argument as amici curiae and for divided argument filed.
25	Feb 1 1989		Order extending time to file response to petition until February 22, 1989.
22	Feb 3 1989		SET FOR ARGUMENT TUESDAY, MARCH 21, 1989. (2ND CASE)
23	Feb 3 1989		Brief amicus curiae of California filed. VIDED.
27	Feb 15 1989		Brief amicus curiae of Appellate Committee of CA DAs Assn. filed. VIDED.
26	Feb 21 1989		Motion of Committee on Criminal Advocacy, et al. for leave to participate in oral argument as amici curiae and for divided argument DENIED.
28	Feb 22 1989		Order further extending time to file response to petition until February 27, 1989.
29	Feb 27 1989		Brief of petitioner United States filed.
30	Mar 1 1989		CIRCULATED.
31	Mar 3 1989	G	Application (A88-700) by Respondent to file a reply brief in excess of page limits, submitted to Justice Marshall.
32	Mar 6 1989		Application (A88-700) granted by Justice Marshall, allowing a maximum of 30 pages.
34	Mar 10 1989	X	Supplemental brief of petitioner United States filed. VIDED.
33	Mar 13 1989	X	Reply brief of respondent filed.
35	Mar 21 1989		ARGUED.

PETITION FOR WRIT OF CERTIORARI

(1)

88-454

No.

Supreme Court, U.S.
FILED
SEP 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

PETER MONSANTO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Any property that is derived from the proceeds of specified offenses under the federal drug laws is subject to forfeiture to the United States under 21 U.S.C. (Supp. IV) 853(a). Where an indictment includes a forfeiture count, the court is authorized to enter an order restraining the defendant from disposing of the property, in order to preserve its availability for forfeiture. 21 U.S.C. (Supp. IV) 853(e)(1)(A). The questions presented are:

1. Whether otherwise forfeitable assets are exempt from forfeiture under Section 853(a) if the defendant wishes to use them to pay an attorney to represent him in the criminal prosecution.

2. Whether, if such assets are not altogether exempt from forfeiture, Section 853(e)(1)(A) authorizes a court to enter a pretrial restraining order that has the effect of preventing the defendant from using covered assets to pay his attorney.

3. Whether, if Sections 853(a) and 853(e)(1)(A) authorize the forfeiture and pretrial restraint of such assets, those provisions are necessarily inconsistent with the defendant's qualified Sixth Amendment right to the assistance of counsel of his choice.

4. Whether, and in what manner, a court may or must hold a hearing on a pretrial restraining order if the order has the effect of barring the defendant from paying attorney's fees.

5. Whether, if the restraining order is lifted and assets are then transferred to an attorney prior to trial, those assets will thereafter be exempt from forfeiture if the defendant is convicted and the assets are found to be the proceeds of his illegal drug activities.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No.

UNITED STATES OF AMERICA, PETITIONER

v.

PETER MONSANTO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App., *infra,* 1a-47a) is not yet reported. The opinion of the panel of the court of appeals (App., *infra,* 48a-76a) is reported at 836 F.2d 74. The restraining order issued by the district court on July 9, 1987 (App., *infra,* 77a-78a); the district court's August 28, 1987 order denying respondent's motion to vacate the restraining order (App., *infra,* 79a); and the district court's January 15, 1988 oral ruling again declining to vacate the restraining order (App., *infra,* 80a-88a) are unreported.

JURISDICTION

The judgment of the court of appeals on rehearing en banc was entered on July 1, 1988. By order dated August 24, 1988, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including September 14, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Due Process Clause of the Fifth Amendment of the United States Constitution provides:

> No person * * * shall * * * be deprived of life, liberty, or property, without due process of law; * * *.

2. The Sixth Amendment of the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence.

3. Section 853 of Title 21 of the United States Code (Supp. IV), which provides for the criminal forfeiture of property that represents the proceeds of violations of the federal drug laws, is reproduced at App., *infra,* 89a-98a.

STATEMENT

1. An indictment naming respondent and 18 other defendants was unsealed in the Southern District of New York on July 8, 1987 (C.A. En Banc App. 5-38). The indictment alleged that from 1981 to 1987, respondent directed an enterprise that distributed massive amounts of heroin, received substantial illicit profits from heroin sales by lower-tier employees, and used intimidation and violence to promote and protect the enterprise's activities

(*id.* at 2-3, 6-23).[1] The first two counts of the indictment charged respondent with conducting and participating in the affairs of a racketeering enterprise through a pattern of racketeering activity, and conspiring to commit those offenses, in violation of the Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. 1962(c) and (d) (C.A. En Banc App. 6-25). Counts three and four charged respondent with conspiring to distribute narcotics and engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 846 and 848 (C.A. En Banc App. 26-34). In counts twelve through fourteen, the indictment charged that respondent had accumulated three specified assets as the proceeds of his narcotics trafficking: (i) a house in Mount Vernon, New York, valued at approximately $335,000 (count twelve); (ii) a cooperative apartment in the Bronx, valued at approximately $30,000 (count thirteen); and (iii) $35,000 in cash (count fourteen).[2] The indictment sought forfeiture of each of those assets pursuant to 21 U.S.C. (Supp. IV) 853, which provides for the forfeiture of assets that, inter alia, constitute or are derived from the proceeds of narcotics violations. C.A. En Banc App. 37-38. App., *infra,* 49a-50a.

On the day that the indictment was unsealed, the district court, pursuant to 21 U.S.C. (Supp. IV) 853(e)(1)(A), granted the government's ex parte motion for an order restraining respondent from selling or transferring the residence in Mount Vernon and the apartment in the Bronx

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[1] The other named defendants were charged with participating as respondent's lieutenants, subordinates, and associates in the narcotics enterprise (C.A. En Banc App. 8-10).

[2] Counts eight through eleven charged respondent, who had previously been convicted of manslaughter, with illegally possessing firearms, in violation of 18 U.S.C. App. 1202 (C.A. En Banc App. 36-37). Respondent was not charged in counts five through seven (*id.* at 34-36).

(App., *infra,* 77a-78a).[3] Section 853(e)(1)(A) authorizes the court, upon application of the United States, to "enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property," where the indictment alleges that "the property with respect to which the [restraining] order is sought would, in the event of conviction, be subject to forfeiture under [Section 853]." See App., *infra,* 50a.

On August 21, 1987, respondent, through Edward M. Chikofsky, who was appearing as his "counsel *pro tem*" for the limited purpose of challenging the restraining order, filed a motion to vacate or modify the order to permit respondent to use the restrained assets to retain private counsel. The motion further sought to exempt legal fees paid to counsel from subsequent forfeiture, even if respondent was convicted and the jury found that the assets used to pay the attorney were the proceeds of respondent's illegal drug activities.[4] Respondent contended that the forfeiture and post-indictment restraining order provisions of Section 853 are unconstitutional under the Sixth Amendment because, by effectively preventing the defendant from using covered assets to pay an attorney, they im-

[3] The government had no occasion to seek a restraining order barring respondent from disposing of the $35,000 in cash, because that cash had been seized by the government (from the apartment in the Bronx) and remained in the government's possession.

[4] Assets of the defendant that are subject to forfeiture under 21 U.S.C. (Supp. IV) 853 remain subject to forfeiture if they have been transferred to a third party, unless the third party establishes at a post-conviction hearing under 21 U.S.C. (Supp. IV) 853(n) that he is "a bona fide purchaser for value of the property who at the time of such purchase was reasonably without cause to believe that the property was subject to forfeiture under this section" (21 U.S.C. (Supp. IV) 853(c)).

permissibly interfere with the defendant's right to retain counsel of his choice. By order dated August 28, 1987, the district court denied respondent's motion to vacate or modify the restraining order, observing that "the intention of Congress in enacting the statute appears clear" and that it was not prepared to find that the forfeiture provisions are unconstitutional (App., *infra,* 79a). See *id.* at 51a.[5]

2. A divided panel of the court of appeals reversed and remanded for further proceedings (App., *infra,* 48a-76a).

a. The majority first held, as a matter of statutory construction, that 21 U.S.C. (Supp. IV) 853 does not exempt assets from forfeiture merely because the defendant wishes to use them to pay his attorney (App., *infra,* 55a-60a). The panel reasoned that "the plain language of the statute is categorical and contains no exception for attorney's fees: 'Any person convicted of a violation . . . shall forfeit to the United States . . . (1) *any property* constituting, or derived from, any proceeds the person obtained, directly or indirectly, as a result of such violation' " (*id.* at 56a, quoting 21 U.S.C. (Supp. IV) 853(a) (emphasis added by the court)).

[5] The district court stated at a hearing on August 6, 1987, that it would permit respondent to invade the restrained assets to the extent necessary to permit him to pay counsel of his choice at a rate equal to that permitted under the Criminal Justice Act (CJA), 18 U.S.C. (& Supp. IV) 3006A. C.A. En Banc App. 55-57; App., *infra,* 50a-51a; see also *id.* at 70a-71a. James Merberg, an attorney who had engaged in discussions concerning representation of respondent if the government agreed not to seek forfeiture of his fees (*id.* at 50a, 52a-53a), apparently was unwilling to accept a fee that was limited by CJA standards. In addition, attorney Chikofsky, respondent's "counsel *pro tem,*" informed the district court that several other attorneys whom he had contacted were unwilling to represent respondent at CJA-level rates. App., *infra,* 50a-51a. Respondent was represented at trial by counsel who was appointed under the CJA. See page 9, *infra.*

The panel rejected respondent's contention that Section 853 permits the forfeiture of property that the defendant transfers to a third party (such as an attorney) only if the transfer was a sham or a fraudulent transaction. Section 853 contains only one exception to forfeiture for property transferred to a third person, and that exception applies only where the transferee establishes at a post-conviction hearing that "he is a bona fide purchaser for value of such property who at the time of the purchase was reasonably without cause to believe that the property was subject to forfeiture" (21 U.S.C. (Supp. IV) 853(c); see also 21 U.S.C. (Supp. IV) 853(n)(6)(B)). The panel noted that this language extends relief only to bona fide purchasers without notice, not to all third-party transferees except those who obtained the property in a sham or fraudulent transaction. Indeed, the panel reasoned, an attorney may have notice that the property is subject to forfeiture "even though his receipt of such property in exchange for legitimate and necessary legal defense services is not fraudulent or less than an arm's length transaction" (App., *infra,* 56a-57a). Finally, the panel found the brief passages in the legislative history upon which respondent relied to be ambiguous and "certainly not clear enough to warrant departure from the plain meaning of the statute" (*id.* at 59a; see *id.* at 57a-60a).

The panel majority also rejected respondent's contention that Section 853 violates the Sixth Amendment right to counsel to the extent it authorizes forfeiture and pretrial restraint of assets that a defendant wishes to use to retain counsel of his choice (App., *infra,* 60a-72a). As an initial matter, the panel stressed that even where a defendant has the necessary financial resources, he has only a qualified right under the Sixth Amendment to retain counsel of his choice, and his interest in doing so may be outweighed by countervailing governmental interests (*id.* at 60a). In the

present context, the panel found a substantial countervailing interest, articulated by Congress when it revised the forfeiture provisions of the RICO and drug laws, in stripping drug offenders of the economic power that they derive from their drug-related activities. In the panel's view, that interest applies equally where the drug offender seeks to use his illegally obtained economic power to pay "very considerable amounts of money" to the attorney who represents him in a RICO or CCE prosecution (*id.* at 61a-62a). By the same token, the panel believed that respondent's position "overvalue[s] the legitimacy of a defendant's interest in using possibly tainted assets" to retain counsel of his choice, since the forfeiture statute provides that " '[a]ll right, title and interest in [forfeitable] property * * * *vests in the United States upon the commission of the act giving rise to forfeiture*' " (*id.* at 62a-63a, quoting 21 U.S.C. (Supp. IV) 853(c) (emphasis added by the court)).

However, the panel majority was not prepared to conclude that the filing of an indictment seeking forfeiture of assets is sufficient in itself to support a pre-trial restraining order that has the effect of preventing a defendant from retaining private counsel of his choice. Accordingly, the panel held that a restraining order having that effect should be modified by the district court to permit payment of counsel unless the government establishes at an adversarial hearing that there is a likelihood that the defendant will be convicted and that the jury will find the property to be the proceeds of the illegal drug activities and therefore forfeited to the United States. App., *infra,* 64a-72a. The panel further ruled that if the government does not meet its burden at such a hearing and the district court lifts the restraining order, the court should also order that any funds that the defendant transfers to his attorney to pay legitimate attorney's fees will be exempt from forfeiture, even if the defendant is later convicted and the jury con-

cludes that the assets transferred to the attorney were the proceeds of the defendant's illegal activities (*id.* at 69a). Conversely, the panel stressed, if the government carries its burden at the hearing and the district court continues the restraining order in effect, the defendant does not have a Sixth Amendment right to an exemption of assets earmarked for an attorney from either pretrial restraint or post-conviction forfeiture. This is so, the panel explained, because there is "no constitutional principle requiring that a defendant whose ability to pay private counsel results solely from the possession of property which he has acquired by criminal activity, which property Congress has declared to be forfeitable, must be placed in a position preferable to that of an indigent defendant who does not have such property at his disposal" (*id.* at 70a). The panel therefore remanded the case to the district court to conduct a hearing on the continuation of the restraining order (*id.* at 71a-72a).

b. Judge Oakes dissented (App., *infra,* 72a-76a). Judge Oakes agreed with the majority that Section 853 applies to assets that the defendant wishes to use to pay his attorney (App., *infra,* 72a). In his view, to read the "bona fide purchaser" exception in Section 853(c) to cover an attorney who had reasonable cause to believe that his fees might be derived from property subject to forfeiture would "improperly contort[ ] the plain language of the statute," because " '[n]o one is more on notice of likelihood that the money may come from . . . prohibited activity than the lawyer who is asked to represent the defendant in the trial of the indictment' " (*ibid.*, quoting *United States* v. *Badalamenti,* 614 F. Supp. 194, 196 (S.D.N.Y. 1985)). In contrast to the majority, however, Judge Oakes concluded that Section 853 violates the Sixth Amendment to the extent it permits the government to recapture assets

that were paid as attorney's fees prior to the defendant's conviction (App., *infra,* 72a-76a).

3. Pursuant to the panel's mandate, the district court on remand conducted a four-day hearing on the question whether the restraining order should be continued. At the conclusion of the hearing on January 15, 1988, the district court once again denied respondent's motion to vacate the restraining order (App., *infra,* 80a-88a), finding that the government had "overwhelmingly established a likelihood of conviction under sections 848 and 846, and that the restrained properties were obtained with the proceeds of narcotics related activities" (*id.* at 86a).[6] Respondent's trial then commenced with opening statements on February 16, 1988, and he was represented at trial by Martin G. Fogelson, who was appointed under the CJA (*id.* at 3a). All of respondent's co-defendants also were represented at trial by counsel appointed under the CJA (or, in one instance, by the public defender). *Id.* at 34a-35a.[7]

4. In the meantime, on January 4, 1988, respondent had filed a petition for rehearing en banc of the panel's decision. The court of appeals granted en banc review on January 29, 1988.[8] In its decision on rehearing en banc

[6] The district court declined to decide whether the government was required to make its showing on the basis of a preponderance of the evidence or by clear and convincing evidence, because it concluded that the government had sustained its burden "above and beyond the standard of clear and convincing evidence" (App., *infra,* 86a).

[7] Two of respondent's co-defendants were represented by retained counsel at the outset of the trial, but those counsel were subsequently appointed under the CJA after the two co-defendants filed affidavits of indigency during the trial. The representation of respondent's co-defendants by attorneys appointed under the CJA (or by the public defender) was not attributable to the pretrial-restraint and forfeiture features of Section 853, because the indictment did not seek forfeiture of the assets of any defendant other than respondent.

[8] On January 26, 1988, the court of appeals had granted re-

(App., *infra,* 1a-47a), rendered on July 1, 1988, the court of appeals ordered that the pre-conviction restraining order be modified to allow respondent access to the restrained assets to the extent necessary to pay legitimate (*i.e.,* non-sham) attorney's fees in connection with the criminal charges against him, and it further held that any fees actually paid to counsel will thereafter be exempt from forfeiture under 21 U.S.C. (Supp. IV) 853(c). This disposition was set forth in a brief per curiam opinion (App., *infra,* 1a-4a), which was followed by eight separate opinions concurring in or dissenting from the court's disposition (*id.* at 4a-47a).

a. Although the en banc court voted 8-4 to vacate the restraining order, the majority was splintered in its rationale, and no more than three judges joined any of the three opinions concurring in that result.

i. Chief Judge Feinberg, in a brief opinion joined by Judge Oakes and Judge Kearse, did not dispute that the forfeiture provisions in 21 U.S.C. (Supp. IV) 853 reach assets that the defendant wishes to use to pay his attorney, but he concluded that those statutory provisions are unconstitutional under the Sixth Amendment to the extent they do so (App., *infra,* 4a-8a). Chief Judge Feinberg believed that the defendant's right to counsel of his choice cannot be infringed unless a "compelling" governmental interest outweighs that right; and in his view, the governmental interests supporting the restraining-order and forfeiture features of Section 853—preventing the defendant from dissipating the assets prior to his conviction, and preventing a defendant from using the economic power

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spondent's motion to recall the mandate and stay the trial pending en banc review, without prejudice to the completion of jury selection, which was then in progress. However, on February 10, 1988, the stay of the trial was dissolved by the en banc court.

that he acquired through his illegal drug activities—"are not all that compelling" (App., *infra,* 5a). As to the former, he found it significant that the government's claim to the disputed assets is only "conditional," since the government's claim of ownership is not finally determined until the prosecution is completed (*ibid.*). As to the latter, Chief Judge Feinberg acknowledged that "defendants' assets generally are a fair target for the government" and that the government does have an interest in preventing criminals from using illegally acquired economic power even to pay an attorney; but he believed that this interest does not outweigh an accused's constitutional right to counsel of his choice (*id.* at 6a). Chief Judge Feinberg therefore concluded that the restraining order must be vacated to the extent necessary to permit respondent access to sufficient funds to retain counsel of his choice, and that the government must be prohibited from later seeking forfeiture of fees paid to respondent's counsel of choice under 21 U.S.C. (Supp. IV) 853(c), "since practical considerations will keep an attorney from accepting fees based upon the contingency of success at the criminal trial" (App., *infra,* 7a).[9]

ii. Judge Winter, in an opinion joined by Judge Meskill and Judge Newman, did not reach the Sixth

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[9] In addition to concurring in Chief Judge Feinberg's opinion, Judge Oakes, in a separate opinion that was not joined by any other member of the en banc court, expressed the view that the Sixth Amendment is implicated not only on the individual level of the particular defendant's right to counsel of his choice, but also on the institutional level, as a result of the necessary reliance in complex RICO and CCE cases on representation by public defenders and appointed counsel (App., *infra,* 8a-9a). Judge Oakes also suggested that Section 853 might be unconstitutional under the Due Process Clause of the Fifth Amendment, because, in his view, it vests the prosecutor with power to decide who will not be defense counsel, creates conflicts of interest for defense counsel, and resembles a "sentence first, verdict afterward" mode of justice (App., *infra,* 9a-10a).

Amendment issue, because he concluded as a matter of statutory construction that Section 853 does not permit the pre-conviction restraint of funds needed by a defendant to make ordinary expenditures, including those necessary to retain private legal counsel, and that expenditures expressly authorized by the district court for such purposes are not subject to post-conviction forfeiture (App., *infra,* 10a-24a). Judge Winter did not dispute that the broad language of Section 853(a), which provides for the forfeiture of "any property" that constitutes or is derived from the proceeds of drug activities, by its terms encompasses property that the defendant wishes to use to pay his attorney. Nor did he dispute that an attorney who has notice, by means of the indictment or otherwise, that the property used to pay his fees might be subject to forfeiture does not have the status of a "bona fide purchaser" under the third-party transferee exception in 21 U.S.C. (Supp. IV) 853(c) and (n). Instead, Judge Winter reasoned that the language in Section 853(e) providing that a court "may" issue a restraining order vests the court with the power to weigh competing interests (App., *infra,* 11a-14a), and he concluded that the court must invariably strike the balance so as to allow a defendant to continue to make ordinary lawful expenditures, including those for private legal counsel (*id.* at 14a-20a). In his view, the purposes of the authorization for district courts to issue restraining orders apply only to such transfers as "unusual lavish expenditures to accelerate consumption in the pre-trial period, transfers to friends or relatives as a desirable alternative to forfeiture, or transfers for purposes of concealment" (*id.* at 16a-17a).

Judge Winter further concluded that any assets that are transferred prior to conviction, in accordance with the district court's exercise of its discretion under Section 853(e)(1), are not subject to post-conviction forfeiture under 21 U.S.C. (Supp. IV) 853(c). He relied on the language in 21 U.S.C. (Supp. IV) 853(c) stating that assets transferred to a third party "may" be the subject of a special verdict of forfeiture. In Judge Winter's view, the word "may" should again be construed to vest the district court with equitable discretion, and in order to vindicate the court's power under Section 853(e)(1) to authorize payments to third parties, the district court must exercise its discretion by declining to order the forfeiture of property it previously had authorized to be transferred to an attorney or other third party.

iii. Judge Miner, in a brief concurring opinion joined by Judge Altimari (App., *infra,* 24a-26a), did not dispute that Section 853 authorizes forfeiture of assets the defendant wishes to use to pay his attorney and that the Sixth Amendment would permit a court to issue a restraining order barring such payments if the court held a hearing of the sort ordered by the panel (*id.* at 24a). However, Judge Miner concluded that the restraining order must be vacated because, in his view, Section 853 does not permit a district court to hold such a hearing on a post-indictment restraining order (App., *infra,* 24a-25a).[10]

b. Judge Mahoney dissented in an opinion that was joined in all but one respect by Judge Cardamone and Judge Pierce (App., *infra,* 26a-41a). He concluded that Section 853 authorizes the post-conviction forfeiture and pre-conviction restraint of otherwise forfeitable assets that the defendant wishes to use to pay his attorney (*id.* at 27a-33a); that the statute as so applied is constitutional if there is a hearing in connection with the issuance of the restraining order (*id.* at 33a-36a); and that the statute permits the court to hold such a hearing (*id.* at 36a-39a). In

[10] Judge Miner declined to join in the declaration in the per curiam opinion that any fees paid to an attorney are exempt from post-conviction forfeiture under 21 U.S.C. (Supp. IV) 853(c) (App., *infra,* 26a).

the portion of the opinion that was not joined by Judges Cardamone and Pierce, Judge Mahoney further concluded that assets that were the subject of a pre-conviction hearing at which the government failed to make the requisite showing, and that were thereafter paid to an attorney, are not subject to forfeiture under 21 U.S.C. (Supp. IV) 853(c) (App., *infra,* 39a-41a). In separate opinions, Judge Cardamone and Judge Pierce concluded that any assets that are actually paid to an attorney are thereafter exempt from forfeiture, whether or not the court held a hearing prior to the payment (*id.* at 41a-42a (Pierce, J.); *id.* at 42a-44a (Cardamone, J.). Judge Pratt also filed a dissenting opinion that agreed with Judge Mahoney on the first three issues (App., *infra,* 44a-47a), but he believed that questions concerning the post-conviction forfeiture of assets were not ripe for resolution (*id.* at 46a-47a).

5. On July 25, 1988, the jury returned a verdict finding respondent guilty on all counts. On the same date, the jury also returned a special verdict finding that the residence in Mount Vernon, the apartment in the Bronx, and the $35,000 in cash are the proceeds of respondent's illegal drug activities and therefore are forfeited to the United States. As of the date of this filing, sentencing is scheduled for September 28, 1988.[11]

[11] The jury's special verdict of forfeiture does not moot either the question of the validity of the restraining order or the instant proceedings on the appeal of the district court's first order refusing to vacate the restraining order. The statute makes clear that the purpose of a restraining order is "to preserve the availability of property * * * for forfeiture" (21 U.S.C. (Supp. IV) 853(e)(1)). Accordingly, a restraining order may properly remain in effect, even after conviction, for as long as necessary to assure that the defendant and others do not interfere with the availability of the property for forfeiture. Consistent with this understanding, the restraining order in this case does not by its terms expire upon the entry of an order of forfeiture or the judgment of conviction or upon completion of proceedings in the district court. See App., *infra,* 77a-78a. It therefore will continue in effect during the pendency of any appeal that respondent might take. If respondent's conviction is reversed on appeal for reasons unrelated to the issuance of the restraining order, that order then would remain in effect during a retrial. Cf. *FDIC* v. *Mallen,* No. 87-82 (May 31, 1988), slip op. 6 n.7.

REASONS FOR GRANTING THE PETITION

1. The en banc court of appeals has held that a district court may not issue a post-indictment restraining order under 21 U.S.C. (Supp. IV) 853(c) that has the effect of preventing a defendant from using otherwise forfeitable assets to pay counsel of his choice—even if the government establishes at a hearing that the jury is likely to find that those assets are the proceeds of the defendant's illegal drug activities. The en banc court of appeals has further held that a district court may not order the forfeiture under 21 U.S.C. (Supp. IV) 853(c) of any assets that the defendant actually transfers to counsel as attorney's fees—even if the defendant is subsequently convicted and the jury finds that the assets transferred to the attorney were the proceeds of the defendant's illegal drug activities. Such special treatment for attorneys and their fees is not permitted under the deliberately sweeping forfeiture provisions of Section 853 and is not mandated by the Sixth Amendment. To the contrary, the special exemption fashioned by the court of appeals—which allows an attorney to retain assets despite the clear notice afforded by the indictment that the assets were subject to forfeiture as the tainted proceeds of illegal drug activities—threatens to undermine public confidence in the integrity of the criminal justice system and to undermine the overall effectiveness of the forfeiture sanction under 21 U.S.C. (Supp. IV) 853 and the identical RICO forfeiture provision, 18 U.S.C. (Supp. IV) 1963.

The holding by the en banc Second Circuit in this case squarely conflicts with the decision of the Tenth Circuit in *United States* v. *Nichols,* 841 F.2d 1485 (1988), which sustained a pre-conviction restraining order that prevented the defendant from using the assets in question to pay his attorney. The decision below also is in tension with the en banc ruling of the Fourth Circuit in *In re Forfeiture Hearing as to Caplin & Drysdale,* 837 F.2d 637 (1988), petition for cert. pending, No. 87-1729 (filed Apr. 11, 1988), which arose in the context of a post-conviction claim by counsel to recover their fees out of assets that had already been declared forfeited to the United States. In *Caplin & Drysdale,* the Fourth Circuit rejected the argument that Section 853 itself exempts assets from forfeiture to the extent they are to be paid to an attorney, and it likewise rejected the notion that the Sixth Amendment requires a special exemption permitting defense counsel to recover their fees out of otherwise forfeitable assets. Other courts of appeals have also taken divergent views in this area. See *United States* v. *Unit No. 7 & Unit No. 8 of Shop in the Grove Condominium, etc. (Kiser),* No. 87-2499 (8th Cir. Aug. 5, 1988) (holding that, at least in the absence of a hearing on the likelihood of forfeitability, property seized in aid of a civil forfeiture must be returned to the defendant if he establishes that it is his only source of funds to pay an attorney to defend him in a related criminal prosecution); *United States* v. *Jones,* 837 F.2d 1332 (5th Cir. 1988) (holding that counsel may recover fees out of assets that have already been declared forfeited to the United States), reh'g granted, No. 87-5556 (Apr. 26, 1988)[12]; *United States* v. *Thier,* 801 F.2d 1463 (1986), modified, 809 F.2d 249 (5th Cir. 1987) (reversing a restraining order

[12] *Jones* is scheduled for oral argument before the en banc Fifth Circuit on September 19, 1988.

that prevented the defendant from using assets to pay his attorney).[13]

For the foregoing reasons, review of the instant case by this Court is clearly warranted. As the Court is aware, we filed a brief in *Caplin & Drysdale* on June 9, 1988, in which we urged the Court to deny certiorari in that case. However, we opposed certiorari at that time principally because there was no firm conflict among the circuits on the statutory and constitutional issues presented. See *Caplin & Drysdale* Br. in Opp. 8-9.[14] Since then, the Second Circuit has rendered its sharply divided en banc decision in the instant case and the Eighth Circuit has rendered its decision in *Kiser.* Moreover, the splintered views of the judges who comprised the majority of the en banc Second Circuit in this case now make evident the need for guidance by this Court, especially with respect to the propriety of and the procedural prerequisites to the issuance or continuance of a restraining order that has the effect of preventing a defendant from using covered assets to pay an attorney.

We also opposed certiorari in *Caplin & Drysdale* last June for the additional reason that the petitioner law firm had elected to continue as counsel for the defendant despite the possibility that it would not recover its fees from the forfeited estate. Because the forfeiture statute therefore did not have the effect of preventing the defendant from being represented by counsel of his choice, we were concerned that *Caplin & Drysdale* would not present

[13] See also *United States* v. *Friedman,* 849 F.2d 1488 (D.C. Cir. 1988) (holding that a convicted defendant does not have a right to use forfeited assets to pay counsel to represent him on the appeal of his conviction).

[14] We have served a copy of our brief in opposition in *Caplin & Drysdale* on counsel for respondent.

a suitable vehicle for a full consideration of the qualified Sixth Amendment right to counsel of one's choice in this setting. See *Caplin & Drysdale* Br. in Opp. 9, 21-22. In addition, because the restraining order in *Caplin & Drysdale* was not challenged on appeal by either the defendant or his counsel, that case would not present an occasion for the Court to address important issues relating to restraining orders. For the same reasons, we continue to be of the view that *Caplin & Drysdale* would not be a suitable vehicle, standing alone, for the resolution of the various issues that have arisen as a result of the application of the forfeiture statutes in this setting. At the same time, we recognize that the issues in *Caplin & Drysdale* do arise in a somewhat different posture, because it involves a *post*-conviction motion by *counsel* to receive payment of his fees out of the forfeited estate, whereas the instant case involves a *pre*-conviction challenge by the *defendant* to a restraining order. In our view, the Court's consideration of the full range of statutory and constitutional issues presented would be assisted by having before it two cases that are in these different postures and involve parties who have somewhat different perspectives. Accordingly, in addition to filing the petition for a writ of certiorari in this case, we are filing a supplemental brief in *Caplin & Drysdale* urging the Court to grant the petition in that case as well.

2. Our brief in opposition in *Caplin & Drysdale* sets out at sufficient length for present purposes our principal submissions on the merits: (i) that the text of Subsections (a) and (c) of Section 853 forecloses the contention that otherwise forfeitable assets are automatically exempt from forfeiture merely because the defendant wishes to use them to pay his attorney (*Caplin & Drysdale* Br. in Opp. 9-14); (ii) that the legislative history of the forfeiture provisions does not furnish a basis for recognizing such an exemption (*id.* at 14-16); and (iii) that the incidental effect of

the forfeiture sanction on the willingness of a private attorney to represent a defendant when the indictment seeks the forfeiture of the proceeds of the criminal conduct charged in the indictment does not impermissibly interfere with the defendant's qualified Sixth Amendment right to counsel of his choice (*id.* at 16-22). There is no need to repeat those arguments here, and we therefore incorporate them by reference. We add only the following discussion on the merits that pertains to the issuance of a restraining order.

The express purpose of the statutory authorization for a court to issue a pre-trial order restraining the defendant from disposing of assets that are the subject of forfeiture count in the indictment is "to preserve the availability of [the] property * * * for forfeiture * * * in the event of conviction" (21 U.S.C. (Supp. IV) 853(e)(1)). We have shown in our brief in opposition in *Caplin & Drysdale* that neither the statute nor the Sixth Amendment exempts assets that the defendant wishes to use to pay an attorney from the ultimate sanction of forfeiture if the defendant is convicted. It necessarily follows that neither the statute nor the Sixth Amendment automatically exempts such assets from the operation of the restraining-order provisions in Section 853(e)(1)(A), since those provisions are intended merely to maintain the status quo pendente lite in order to assure the effectiveness of the forfeiture sanction in the event of conviction.

Thus, under the statute, the defendant may be deprived *permanently* of his assets (despite his desire to devote those assets to the payment of attorney's fees) if he is convicted and the assets have been declared forfeited as the proceeds of illegal drug activities, and he also may be deprived *temporarily* of the use of the assets to pay his attorneys or other creditors prior to completion of the trial, at least if the court determines that the government has

made a sufficient showing (on the basis of the indictment or other submissions that may be required) that it is likely that the assets in question will be found to be forfeited. If the defendant ultimately is acquitted or his property is not forfeited, then the temporary restraint on disposition of the assets will be lifted and the defendant will be free to use them to pay his attorney's fees or any other lawful expenses. But if the defendant is ultimately convicted and his property forfeited, that result will emphatically confirm the accuracy of the court's (and the grand jury's) pre-trial assessment that the assets would likely be found by the jury to be the tainted proceeds of the defendant's illegal drug activities and for that reason were *already* the property of the United States under 21 U.S.C. (Supp. IV) 853.[15] And that result will also conclusively refute the notion that the defendant was unfairly denied the opportunity to use the assets to pay his attorney or otherwise to treat them as his own during the time between the return of the indictment and the return of the jury's special verdict of forfeiture.

This Court recently reaffirmed in *Wheat* v. *United States,* No. 87-4 (May 23, 1988), that the Sixth Amendment right to counsel of choice is only qualified and that "a defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant" (slip op. 6). It is only where the government "arbitrarily" interferes with a defendant's interest in being represented by a particular lawyer or denies a defendant a "fair opportunity to secure counsel of his own choice" that a constitutional violation may be found. *Powell* v. *Alabama,* 287 U.S. 45, 53, 69 (1932). The carefully tailored and balanced statutory provisions for the

[15] Section 853(c) provides that "[a]ll right, title, and interest in property [subject to forfeiture] vests in the United States upon the commission of the act giving rise to the forfeiture under this section."

issuance of pre-trial restraining orders pending the possible forfeiture of tainted assets does not "arbitrarily" or unfairly impinge upon the defendant's qualified right to counsel of choice. At most, the operation of those provisions may temporarily place the defendant in a position where he "cannot afford" to pay the attorney he would prefer to hire and may cause that attorney to "decline[ ] to represent the defendant" because of uncertainty about whether the restrained assets will ultimately be available to pay his fee. Under *Wheat,* those consequences do not impermissibly interfere with the qualified Sixth Amendment right to counsel of one's choice.[16]

[16] Largely for the reasons given by Judge Mahoney (App., *infra,* 27a-33a), we disagree with Judge Winter's minority view (*id.* at 11a-20a) that the presence of the word "may" in 21 U.S.C. (Supp. IV) 853(e)(1)(A) not only permits but actually requires a district court to modify an otherwise proper restraining order whenever the defendant wishes to make an "ordinary" expenditure out of the frozen assets. We likewise disagree with Judge Winter's view (App., *infra,* 21a-23a) that the presence of the word "may" in 21 U.S.C. (Supp. IV) 853(c) requires a district court to exempt from post-conviction forfeiture any assets that it authorized to be transferred prior to trial to meet "ordinary" expenses, even if the transferee received the assets with full notice that the assets were subject to forfeiture. The word "may" in Section 853(e)(1)(A) serves only to permit the court to exercise some equitable discretion in determining whether to continue a restraining order that will *temporarily* maintain the status quo pending the outcome of the trial, or instead to vacate or modify the order to grant the defendant access to the assets pending that outcome. Neither Section 853(e)(1)(A) nor Section 853(c) authorizes the district court to ignore the express statutory mandate that all property identified in the indictment be forfeited if it is found to be the proceeds of the defendant's illegal drug activities by permitting the defendant to make an essentially *permanent* disposition of those assets.

For similar reasons, we also disagree with the view of the panel

CONCLUSION

The petition for a writ of certiorari should be granted and the case should be consolidated for purposes of oral argument with *Caplin & Drysdale* v. *United States*, petition for cert. pending, No. 87-1729.

Respectfully submitted.

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SEPTEMBER 1988

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majority (App., *infra*, 69a-70a) that if the government fails to make a sufficient showing at the hearing required by the panel, and if the district court therefore lifts the restraining order to the extent necessary to permit payment of attorney's fees, any assets that are thereafter transferred to the attorney for that purpose are exempt from post-conviction forfeiture. Again, the purpose of the hearing is only to determine whether the court should issue a temporary order to maintain the status quo pending the outcome of the trial, not to enable the court to effectively make a final determination of the forfeiture issue prior to trial in order to give the defendant and his attorney (or any other third-party transferee) absolute assurance that assets transferred to the attorney will be insulated from the operation of the forfeiture sanction even if the defendant is convicted.

Finally, we disagree with the minority view of Judge Miner (App., *infra*, 24a-26a) that a district court is prohibited by Section 853(e)(1)(A) from holding a hearing on whether to continue a post-indictment restraining order that has the effect of preventing the defendant from paying attorney's fees. Although we agree in large part with Judge Mahoney's answer to Judge Miner on this statutory issue (see App., *infra*, 36a-39a), we do not necessarily endorse all of his views, or those of the panel majority (see App., *infra*, 65a-70a), regarding the scope of the inquiry that is appropriate at a pretrial hearing.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 436—August Term 1987
Docket No. 87-1397

UNITED STATES OF AMERICA, APPELLEE

against

PETER MONSANTO, DEFENDANT-APPELLANT

Argued: March 30, 1988
Decided: July 1, 1988

Before: FEINBERG, *Chief Judge*, OAKES, MESKILL, NEWMAN, KEARSE, CARDAMONE, PIERCE, WINTER, PRATT, MINER, ALTIMARI and MAHONEY, *Circuit Judges*.

PER CURIAM:

This is an appeal from an order of the United States District Court for the Southern District of New York, Robert J. Ward, J., denying a motion to vacate or modify an ex parte post-indictment restraining order entered pursuant to a provision of the Comprehensive Forfeiture Act of 1984 (CFA), 21 U.S.C. § 853(e)(1)(A) and for a declaration that fees paid to appellant's defense counsel would be exempt from post-conviction forfeiture pursuant to the "relation back" provision of the CFA, 21 U.S.C. § 853(c). The appeal was originally heard by a panel of the court, 836 F.2d 74 (2d Cir. 1987), and has been reheard in banc.

The relevant facts of this case, which are described in greater detail in the panel opinion, are as follows. In an indictment unsealed in July 1987, Peter Monsanto was indicted on various RICO, narcotics, continuing criminal enterprise and firearms charges. The indictment specified two parcels of residential real property, valued at $335,000 and $30,000, as well as $35,000 in cash, as "constituting and derived from the proceeds" of violations of Title III of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 801 et seq., and thus subject to forfeiture pursuant to 21 U.S.C. § 853(a). The district court entered an ex parte restraining order pursuant to 21 U.S.C. § 853(e)(1)(A) prohibiting Monsanto from transferring or encumbering the residential properties.

In August 1987, Monsanto moved to vacate or modify the restraining order, seeking use of the restrained assets to retain private trial counsel and a declaration that fees paid to such counsel would be exempt from post-trial forfeiture. He argued that Congress did not intend the CFA to apply to property needed to pay legitimate attorney's fees and that if the statute did apply to such property it would violate his sixth amendment right to counsel of choice. He challenged not only the post-indictment restraint provision, 21 U.S.C. § 853(e)(1)(A), but also the post-conviction "relation back" provision, 21 U.S.C. § 853(c), which allows the government to seek post-conviction forfeiture of property transferred to third persons, unless such persons establish that they were bona fide purchasers for value who at the time of the purchase were reasonably without cause to believe that the property was subject to forfeiture.

The district court refused to vacate the restraining order, although it acknowledged that the effect of the order was to render Monsanto indigent. The court ruled that it was not prepared to find the forfeiture provisions of

the CFA unconstitutional as applied to attorney's fees and that Congress did not intend to exempt such fees from application of the statute. It also denied Monsanto's request for a declaration that fees paid to defense counsel would be exempt from post-conviction forfeiture. The court indicated, however, that it would allow invasion of the forfeitable assets to pay Monsanto's counsel of choice to the extent of the rates established by the Criminal Justice Act, 18 U.S.C. § 3006A (CJA).

Monsanto brought an expedited appeal and a panel of this court issued an opinion in December 1987, with one judge dissenting. 836 F.2d 74 (2d Cir. 1987). The panel concluded that the post-indictment restraint and post-conviction forfeiture provisions of the CFA can apply to funds needed to pay legitimate attorney's fees. The panel held, however, that notice and a pre-trial hearing—at which the government has the burden of demonstrating the likelihood that the assets the government seeks to restrain are forfeitable—are constitutionally required for the government to restrain assets needed to pay a defendant's counsel of choice. The panel held that where the government fails to meet such a burden any funds used to pay legitimate attorney's fees would be exempt from post-trial forfeiture. 836 F.2d at 84.

The case was remanded and the district court held a hearing as required by the panel opinion. Following the hearing, the district court ruled that the government had met its burden of demonstrating the likelihood that the restrained assets were forfeitable and that the restraining order therefore need not be lifted. Monsanto's trial commenced in February 1988 and is still in progress in the district court. We are told that at trial Monsanto is represented by counsel appointed under the CJA.

In January 1988, this court voted to rehear the appeal in banc, and we heard oral argument on March 30, 1988. As

is indicated by the separate concurring opinions, a majority of the members of the in banc court, albeit for varying reasons agree that the order of the district court denying Monsanto's motion should be vacated and the case remanded with instructions to modify the restraining order to permit Monsanto access to restrained assets to the extent necessary to pay legitimate (that is, non-sham) attorney's fees in connection with the criminal charges against him. A majority of the members of the court also agree that any such fees paid to Monsanto's defense counsel are exempt from subsequent forfeiture pursuant to 21 U.S.C. § 853(c).

The order of the district court is vacated and the matter is remanded to the district court for further proceedings consistent with this opinion.

FEINBERG, *Chief Judge,* with whom Oakes and Kearse, *Circuit Judges,* join, concurring:

I concur in the holding of the court because I believe that the post-indictment restraint and post-conviction "relation back" provisions of the CFA conflict with the right of criminal defendants to select their own counsel. To the extent these provisions prevent an indicted defendant who would otherwise be able to retain counsel of choice from doing so, they are unconstitutional. I do not believe that the hearing envisioned in the panel opinion, 836 F.2d 74, is sufficient to overcome the constitutional infirmities.

The sixth amendment right to counsel of choice is a fundamental right that serves to protect other constitutional rights. It is a key element in our system of criminal justice and distinguishes that system from others that do not allow individuals the chance to resist in a meaningful way

the imposition of government power upon them. Therefore, the right to counsel of choice cannot be infringed unless a compelling governmental purpose outweighs it. Many of the cases that allows limitations on the right to counsel of choice deal only with partial limitations or infringements, such as preventing a defendant from substituting counsel once the trial has begun, see, e.g., United States v. Paone, 782 F.2d 386, 392 (2d Cir.), cert. denied, 107 S. Ct. 269 (1986), or disqualifying a particular lawyer, see, e.g, United States v. DiTommaso, 817 F.2d 201, 291-20 (2d Cir. 1987). In contrast, the right in this case is destroyed almost completely by depriving the defendant of the means to retain counsel of choice prior to the commence of trial. Therefore, one would suppose that the government justification for such drastic action is overwhelming persuasive.

The fact is just to the contrary. The suggested governmental interests that are served by restraining, and permitting, the ultimate forfeiture of, assets that are needed to pay attorney's fees are not all that compelling. The government's interests are that assets it seeks to obtain not be dissipated in the relatively brief period from indictment to possible conviction and that an alleged criminal not be able to use his economic power obtained from illegal activities. As to the former, the government's claim to the disputed assets at the time of restraint is only conditional, since under the CFA the government's ownership interest in the assets is not determined until the outcome of the criminal prosecution. This is not to say that the government has no claim to these assets at all, but only that the claim is not sufficiently strong to prevent those assets from being spent on an accused's defense when the accused has no other funds available. Moreover, it must be remembered that in this sixth amendment context, the

government is not prevented from freezing an indicted defendant's *other* assets—those not necessary for payment of counsel—so that there will be no dissipation or concealment of those.

To the extent that the government seeks to strip an accused of the economic power he obtained from alleged illegal activities, this interest is weak in the context before us. As I have just indicated, defendants' assets generally are a fair target for the government. We are concerned here with only one aspect of economic power, the power to hire an attorney in relation to the criminal prosecution. Of course, weakening the ability of an accused to defend himself at trial is an advantage for the government. But it is not a legitimate government interest that can be used to justify invasion of a constitutional right. Our holding does not allow a criminal to retain his illgotten economic power after conviction. It frees assets only when they are used to pay legitimate attorney's fees and when no other assets are available. It does not allow defendants to shelter untainted assets by paying a lawyer with tainted property first. Thus, if the accused is ultimately convicted, the only assets our holding will have saved from forfeiture are assets that have been spent on defense. Admittedly, the government does have some interest in preventing criminals from using ill-gotten economic power to hire attorneys, but that interest simply does not outweigh an accused's constitutional right to counsel of choice.

The government argues that since United States v. Salerno, 107 S. Ct. 2095 (1987), held that a defendant may be detained pending trial, the restraint on a defendant's property here (as opposed to his liberty) must be permissible. The argument seems persuasive at first blush, but on further analysis it is not. *Salerno* stands for the proposition that an accused's liberty interest may sometimes be overcome by the compelling government interest in coping

with an immediate threat to public safety. Here there is no government interest anywhere near as compelling as that. Nor is the restrain here on property alone. The restraint affects the right to counsel of choice, which in turn affects important liberty interests.

Therefore, the statute as applied below is unconstitutional. The sixth amendment mandates that the district court, in evaluating a restraining order, permit a defendant access to sufficient funds to pay the legitimate costs of his defense. On remand, the court must permit invasion of the restrained assets to the extent necessary to provide Monsanto with sufficient funds to retain counsel of choice. The government must also be prohibited from later seeking forfeiture of fees paid to Monsanto's counsel of choice. On the facts before us, the "relation back" provision of 21 U.S.C. § 853(c) has the same effect as a restraining order when applied to attorney's fees, since practical considerations will keep an attorney from accepting fees based upon the contingency of success at the criminal trial.

Our holding does permit some who have engaged in criminal activity to obtain a particular attorney solely because they have gained economic power through crime. And, it may be true (although unfortunate) that greater financial power frequently buys the ability to present a stronger and more thorough defense. The small societal cost of allowing criminals to use their illegally obtained wealth to hire an attorney, however, is the price we must pay for protecting the rights of the innocent, who might otherwise be deprived of legitimate economic power in waging a full defense. It is a cost of our adversarial system, which places great value on protecting the rights of the accused. The trouble with the statute, as applied in this case, is that it deprives defendants of their economic

power to hire an attorney before they are proven to be criminals.

It is true, as the dissenting opinion of Judge Mahoney points out, that other circuits, although not without disagreement within the circuit, have held the statute as applied here constitutional. For the reasons set forth above, I respectfully disagree with the reasoning of those opinions.

The government must prove that an accused is guilty beyond a reasonable doubt. It must do this by obtaining convincing evidence of the defendant's guilt, not by preventing the defendant from retaining counsel of choice. As Judge Rubin said concurring in United States v. Thier, 801 F.2d 1463, 1477 (5th Cir. 1986), modified, 809 F.2d 249 (1987):

> The Government should not be permitted to cripple the defendant at the outset of the [trial] by depriving him of the funds he needs to retain counsel. . . .

I agree.

OAKES, *Circuit Judge* (concurring):

I concur in the per curiam opinion and in Chief Judge Feinberg's Sixth Amendment opinion so far as it goes. As the dissenter on the original panel, 836 F.2d 74, 85 (2d Cir. 1987), I am pleased that the court saw fit to rehear the case en banc and that the majority sees fit to reverse the district court. I write only a few additional words to amplify my views, as set forth in that dissent, that the forfeiture statute is "unconstitutional at least on Sixth Amendment, and possibly on Fifth Amendment due process, grounds." *Id.* at 87.

The Sixth Amendment, in my view, is implicated not only on the individual level of the particular defendant's

right to the counsel of his choice, but also on the institutional level of the criminal justice system as a whole. That is, there is a systemic interest in permitting defense counsel to perform their proper role in our adversary system of justice, a role in and of itself worthy of protection. *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984); *United States v. Cronic*, 466 U.S. 648, 655-56 (1984); *Herring v. New York*, 422 U.S. 853, 862 (1975). *See also* Cloud, *Forfeiting Defense Attorneys' Fees: Applying an Institutional Role Theory to Define Individual Constitutional Rights*, 1987 Wis. L. Rev. 1, 8-15; Note, *Against Forfeiture of Attorneys' Fees Under RICO: Protecting the Constitutional Rights of Criminal Defendants*, 61 N.Y.U. L. Rev. 124, 146-48 (1986). By permitting prosecutors to undermine the quality of the defendants' counsel in the very type of complex criminal case (RICO, CCE) where astute, experienced counsel is most needed, the pretrial restraint and post-conviction "relation back" forfeiture provisions as applied to legitimate attorney's fees deny defendants counsel of choice and a fair trial. These Sixth Amendment considerations are not saved by a pretrial mini-trial such as was had here, for the reasons stated in 836 F.2d at 86-87.

The Fifth Amendment due process clause is also implicated, I now believe, for several reasons. The forfeiture statute puts too much power in the hands of the prosecution to determine who will *not* be defense counsel, power that is particularly pernicious because the present system of providing counsel for the indigent may not provide effective representation in the long, complicated RICO and CCE cases. *See United States v. Thier*, 801 F.2d 1463, 1473 (5th Cir. 1986) (Rubin, J., concurring), *modified*, 807 F.2d 249 (5th Cir. 1987). The forfeiture provisions infect the system with the unavoidable conflicts of interest

and ethical dilemmas for the defense attorney that jeopardize the right to due process. *See United States v. Badalamenti,* 614 F. Supp. 194, 196-97 (S.D.N.Y. 1985). *See also* Note, *Attorney Fee Forfeiture,* 86 Colum. L. Rev. 1021, 1030-36 (1986).

In addition, pretrial forfeiture, especially when coupled with pretrial detention, *see United States v. Ojeda Rios,* No. 88-1080, slip op. 3145 (2d Cir. May 13, 1988), too closely resembles the Alice-in-Wonderland Queen's "sentence first, verdict afterward" mode of justice. The history underlying the adoption of the Fifth Amendment, involving pretrial confinement, no right to counsel, bills of attainder, and more, *see* L. Levy, *Origins of the Fifth Amendment* (1968), together with the interrelationship of the principles embodied in the Bill of Rights, *see* Oakes, *The Proper Role of the Federal Courts in Enforcing the Bill of Rights,* 54 N.Y.U. L. Rev. 911, 919-24 (1979), persuades me that the Founders would never have countenanced the Comprehensive Forfeiture Act of 1984, 21 U.S.C. § 853.

A statutory scheme that sacrifices the relationship between client and attorney, that invites the prosecutor to undermine that adversarial process, and that imposes sentence before trial (not to mention that denies a defendant his right to counsel of choice) cannot and must not survive constitutional scrutiny.

WINTER, *Circuit Judge,* with whom Judges Meskill and Newman join, concurring:

I believe it unnecessary to address the constitutional issues reached by my colleagues because I conclude that: (i) the statute in question does not permit the preconviction restraint of funds needed by a defendant to make ordinary lawful expenditures, including expen-

ditures to retain private legal counsel; and (ii) expenditures expressly authorized by the district court for such purposes are not subject to post-conviction forfeiture.

The relevant provisions of the Comprehensive Forfeiture Act, Pub. L. No. 98-473, 98 Stat. 2040 (1984), are drafted in permissive—"may"—rather than mandatory—"shall"—terms. *See* 18 U.S.C. § 1963(e) (Supp. IV 1986); 21 U.S.C. § 853(e)(1)(A) (Supp. IV. 1986). Because of the "may" language and the lack of any evidence of congressional intent to the contrary, I read the Act to vest district courts with the discretionary power to restrain assets identified in an indictment as subject to forfeiture. The exercise of that discretion is to be guided by traditional equitable principles that balance the relative hardships to the parties. The government has no interest derived from the Act in preventing a defendant from making ordinary lawful expenditures during the period from indictment to conviction, including expenditures for the retention of private counsel. Similarly, the forfeiture provisions governing transfers to third parties are also discretionary, 18 U.S.C. § 1963(a)(3) (Supp. IV. 1986); 21 U.S.C. § 853(c) (Supp. IV 1986), and at the very least, must exempt from forfeiture any payments authorized by the court under Section 853(e)(1). If that interpretation is correct, the due process and sixth amendment issues need not be addressed. I therefore concur in the judgment of the court. My reasons follow.

I

The so-called restraint provision of the Act, 21 U.S.C. § 853(e)(1) provides in pertinent part:

(e) *Protective orders*

(1) Upon application of the United States, the court *may* enter a restraining order or injunction, require the

execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section—

> (A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II of this chapter for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; . . .

(emphasis added).

I am frankly puzzled why a statutory provision with such permissive language has been read by so many courts to authorize as a routine matter, much less require, the most draconian of restraints on a defendant's assets without giving any consideration to the hardship such a restraint imposes. Indeed, the established canon of statutory construction is to favor the retention of full equitable powers by courts absent a clear statement of a contrary legislative intent. Unless Congress "in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *accord, e.g., Amoco Prod. Co. v. Village of Gambell,* 107 S.Ct. 1396, 1402.03 (1987); *Brown v. Swann,* 35 U.S. (10 Pet.) 496, 503 (1836) ("The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction."). We thus should not lightly presume that Congress, in enacting the Act, intended to dispense with "the requirement of equity practice" and their "background of several hundred years of history," *Hecht Co. v. Bowles,* 321 U.S. 321, 329 (1944), a history

"of which Congress is assuredly well aware." *Weinberger v. Romero-Barcelo,* 456 U.S. 305, 313 (1982).

Even if Congress had used the word "shall" instead of "may," there is caselaw holding that an exercise of equitable discretion would still be required. For example, the Emergency Price Control Act of 1942 provided that in certain circumstances "a permanent or temporary injunction, restraining order, or other order *shall* be granted without bond." *Brown v. Hecht Co.*, 137 F.2d 689, 690 (D.C. Cir. 1943), *rev'd sub nom. Hecht Co. v. Bowles,* 321 U.S. 321 (1944). Nevertheless, the Supreme Court concluded "that 'shall be granted' is less mandatory than a literal reading might suggest." 321 U.S. at 328. The Court noted "that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made." *Id.* at 329.

In addition, the legislative history of the Act supports the conclusion that courts retain their full equitable powers in issuing orders under Section 853(e)(1). The Senate Report expressly indicates that district courts may hold hearings concerning restraints on a defendant's assets imposed under that Section. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 191, 203, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3374, 3386 ("This provision does not exclude . . . the authority to hold a hearing subsequent to the initial entry of the order and the court may modify the order or vacate an order that was clearly improper. . . ."). The legislative history is clear, however, that this hearing is not to inquire into the evidentiary strength or weakness of the government's case on criminality. Immediately after noting that a hearing may be held and "the court may modify the order," the Senate Report states:

> However, it is stressed that at such a hearing the court is not to entertain challenges to the validity of the indictment. For the purposes of issuing a restraining order, the probable cause established in the indictment or information is to be determinative of any issue regarding the merits of the government's case on which the forfeiture is to be based.

S. Rep. No. 225, at 203, *reprinted in* 1984 U.S. Code Cong. & Admin. News at 3386.

It seems almost self-evident that if the purpose of the hearing is not to test the government's evidence of criminality, then it purpose must be to allow an informed balancing of the relative hardships on the parties according to traditional principles of equity with regard to preconviction restraints upon a defendant's assets. For reasons stated below, that balance should be struck so as to allow a defendant to continue to make ordinary lawful expenditures, including expenditures to retain private legal counsel. These expenditures should be controlled, however, to prevent the defendant from making unusual expenditures for luxuries in anticipation of a conviction and forfeiture, from executing sham transfers, and from using assets for criminal purposes. In short, the court may seize the assets of a defendant but should allow controlled ordinary lawful expenditures.

The Act authorizes pre-conviction restraint in order to protect the government's right to a post-conviction forfeiture. In weighing the potential hardship on the government with regard to a pre-conviction restraint on a defendant's assets, therefore, we must scrutinize its interest under the Act in ultimately obtaining a forfeiture of those assets. Although the Act's relation-back forfeiture provision gives the government a nominal property right in potentially forfeitable assets, this property right is derived solely from the government's interest in crime con-

trol. For example, the government expressly disclaimed at oral argument any interest in criminal forfeitures under the Act as a means of raising revenue.[1] The mere fact that the assets ultimately forfeited after conviction may be less than if a total preconviction restraint had been imposed does not, therefore, contravene any purpose of the Act. Cases involving the seizure of property where revenue raising purposes are implicated at thus inapplicable. Similarly, *United States v. Salerno,* 107 S. Ct. 2095 (1987), which upheld a restraint on the person of a defendant, was based on the government's interest in preventing that defendant from commiting crimes in the pre-conviction period.

The Act provides for forfeiture only as a penalty designed to eradicate certain criminal organizations and to deter racketeering and narcotics trafficking. As the Senate Report explained:

> Profit is the motivation for this criminal activity, and it is through economic power that it is sustained and grows. More than ten years ago, the Congress recognized in its enactment of statutes specifically addressing organized crime and illegal drugs that the conviction of individual racketeers and drug dealers

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[1] After it obtains a forfeiture verdict, the government of course reaps an economic benefit from forfeited assets by using them to relieve "the financial burden aggressive forfeiture cases place[] on our law enforcement agencies." S. Rep. No. 225, at 197, *reprinted in* 1984 U.S. Code Cong. & Admin. News at 3380; *see* 21 U.S.C. § 881(e) (Supp. IV 1986) (providing for sale, destruction or governmental use of forfeited assets). However, as the government's concession at oral argument suggests, forfeiture is not an efficient way to raise revenue. Indeed, the Senate Report notes that the Act was enacted in part to "defray the escalating costs" of forfeiture, S. Rep. No. 225, at 193, *reprinted in* 1984 U.S. Code Cong. & Admin. News at 3376, and Congress hardly enacted the provisions at issue here in order to defray the cost of their application.

would be of only limited effectiveness if the economic power bases of criminal organizations or enterprises were left intact, and so included forfeiture authority designed to strip these offenders and organizations of their economic power.

Today, few in the Congress or the law enforcement community fail to recognize that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in danger drugs which, with its inevitable attendant violence, is plaguing the country. Clearly, if law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes. Forfeiture is the mechanism through which such an attack may be made.

S. Rep. No. 225, at 191, *reprinted in* 1984 U.S. Code Cong. & Admin. News at 3374 (footnote omitted).

There is nothing in the language or legislative history of the Act indicating that Congress hoped to eradicate criminal organizations or to deter racketeering or narcotics trafficking by imposing financial penalties upon defendants *before* conviction and forfeiture. In the only passage remotely supporting a contrary view, the Senate Report stated that the restraint provision was intended only "to preserve the availability of a defendant's assets for criminal forfeiture and, in those cases in which he does transfer, *deplete*, or conceal his property, to assure that he cannot *as a result* avoid the economic impact of forfeiture." *Id.* at 196, *reprinted in* 1984 U.S. Code Cong. & Admin. News at 3379 (emphasis added). The "depletions" with which Congress was concerned were thus only those that enable a defendant to avoid the economic impact of a *post-conviction* forfeiture. Unlike unusual lavish expenditures to accelerate consumption in the pre-trial

period, transfers to friends or relatives as a desirable alternative to forfeiture, or transfers for purposes of concealment, ordinary lawful expenditures do not enable a defendant to avoid the economic impact of a post-conviction forfeiture, because such expenditures would have been made without regard to the prospect of such a forfeiture. A pre-trial restraint on ordinary lawful expenditures on the other hand irreparably imposes the economic impact of forfeiture before conviction. Read as a whole, the legislative history indicates only that Congress was concerned about the "improper disposition of forfeitable assets," *id.* at 194, *reprinted in* 1984 U.S. Code Cong. & Admin. News at 3777, "defendants defeating forfeiture by removing, transferring, or concealing their assets," *id.* at 195, *reprinted in* 1984 U.S. Code Cong. & Admin. News at 3378, and "shield[ing] them from . . . forfeiture." *Id.*[2]

Congress's crime-prevention purposes are thus served by preventing a defendant like Monsanto from making unusual expenditures on luxuries in anticipation of incarceration and forfeiture. They are also served by preventing transfers to friends and relatives in the same anticipation or transfers for purposes of concealment and later use. Finally, the Act's purposes are served by preventing expenditures from criminal purposes during the pre-conviction period. Preventing ordinary lawful expen-

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[2] The dissent quotes at length a portion of the House Report concerning the so-called "Black Tuna" case. The portions italicized by the dissent read in isolation support its position. Read as a whole, the quoted statement simply does not state that either the counsel fees, if legitimate, would be subject to forfeiture. In fact, the statement equates counsel fees with amounts paid to a wife who was apparently a co-owner of the residence. No one has suggested that a co-owner's share of an asset may be forfeited. The only policy concern expressed in the statement is that "a considerable amount of the 'proceeds' of this drug operation are elsewhere, probably funding future 'Black Tunas.' "

ditures, however, does not serve any purpose of the Act and would constitute a punishment imposed *before* conviction and forfeiture.[3]

Because a pre-conviction restraint on ordinary lawful expenditures is a punishment, hardship is inflicted on a defendant to the extent of the restraint. In this case, the effect of the restraint was to render Monsanto indigent. It contained no provision for access to assets for food, medical care or legal counsel. If he were a lessee instead of a homeowner, he would now lack funds for shelter.[4] Given the absence of a countervailing governmental interest, it is an abuse of discretion not to acknowledge the priority of a defendant's interest in making ordinary lawful expenditures, including those necessary to retain private counsel. The actual making of expenditures, of course, can be directly controlled by the district court to insure that they are for permissible purposes.

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[3] It is arguable that a purpose of restraining, prior to conviction, assets that would otherwise have been spent for normal living expenses, including ordinary legal fees, is to deter engaging in activities that yield forfeitable proceeds. That purpose cannot warrant the exercise of discretion to restrain assets needed for ordinary living expenses for three reasons: (1) Congress has given no indication that it wishes to achieve such a purpose by this means; (2) preventing purchase of ordinary goods and services prior to trial has an insignificant marginal deterrent effect compared to the prospect of substantial prison sentences, and any such enhanced deterrence is manifestly outweighed by the equities favoring the defendant's purchase of ordinary goods and services; and (3) assertion of such a purpose would encounter a substantial due process issue as to whether preventing such purchases in order to deter crime amounts to punishment in advance of conviction.

[4] Logically, the position that all assets identified as tainted may be seized before trial would entail seizure of a home, rather than a prohibition on encumbrances, so that the rental value might be preserved for ultimate forfeiture instead of being consumed by the defendant.

It should be noted that on this point our difference with the dissent appears to be quite narrow. The dissent agrees that the CFA permits payments to grocers or doctors, and presumably to other purveyors of legitimate and ordinary goods and services, out of restrained assets. Our difference is thus limited to payments for counsel fees. With regard to that difference, we add the following. First, if courts retain their traditional equity powers regarding the scope of pre-trial restraints, there is no reason in the law of equity to distinguish between medical care and legal counsel. So far as cost is concerned, a surgeon of one's choice may be as expensive as a lawyer of one's choice. So far as hardship is concerned, defendants subject to a pre-trial restraint on all assets can turn to government programs providing medical care or legal counsel to the indigent. Moreover, payments for legal counsel implicate a constitutional provision providing protection for the retention of private counsel, and it can hardly be contended that equity disfavors the use of private funds for that purpose.

Second, there is nothing in the CFA that exempts attorney's fees from the exercise of traditional equity powers. This point is best illustrated by comparing the dissent's interpretation of the statute with that of the panel majority. The panel opinion noted that "the plain language of the statute is categorical and contains no exception for attorney's fees." 836 F.2d at 78. It quoted the statutory language, "Any person . . . shall forfeit . . . *any* property," *id.* (emphasis in panel opinion), and observed that the only exception to this all-encompassing language concerned bona fide purchasers. *Id.* at 79. It stated that on the face of the statutory language a bona fide purchaser meant simply a purchaser without notice that the property might be subject to forfeiture. The panel next turned to various general statements in the legislative history relied

upon by appellant as limiting third-party forfeitures to sham transactions. The panel concluded that the legislative history was "thoroughly ambiguous" and "certainly not clear enough to warrant departure from the plain meaning of the statute." *Id.* at 80. Legitimate counsel fees paid to lawyers with notice might therefore be forfeited.

The dissent's reasoning is at odds with that of the panel because the dissent allows for payments to a considerable variety of providers of legitimate and ordinary goods and services who may have notice that the payments are from assets otherwise subject to forfeiture. The dissent thus does not contemplate, as did the panel, a complete restraint on "*any* property" from which an exception for attorney's fees would have to be judicially implied. Instead, the dissent contemplates an exemption from restraint and forfeiture of a variety of legitimate and ordinary expenditures to persons with notice of the possibility of forfeiture. The dissent then implies an exception to those permissible expenditures barring payments for legitimate attorney's fees. Our position is that if Congress intended to allow courts in the exercise of traditional equity powers to authorize expenditures from otherwise restrained assets, Congress's failure to include a provision expressly disallowing payments for counsel fees calls into play the plain meaning rule relied upon by the panel.

I believe that a straightforward application of standard principles of statutory construction requires this interpretation of Section 853(e)(1) even in the absence of the farreaching constitutional issues a different reading of the statute encounters. However, if anything remains of the canon that statutes capable of differing interpretations should be construed to avoid constitutional issues, *see Kent v. Dulles,* 357 U.S. 116 (1958), it surely applies here.

II

I turn now to whether bona fide payments for ordinary lawful expenditures, including attorneys' fees, made pursuant to a district court's exercise of equitable discretion under Section 853(e)(1),[5] may nevertheless be subject to post-conviction forfeiture. The forfeiture provision, Section 853(a), provides in pertinent part:

> (a) *Property subject to criminal forfeiture*
>
> *Any person convicted* of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year *shall* forfeit to the United States, irrespective of any provision of State law—
>
> (1) *any* property constituting, or derived from, *any* proceeds the person obtained, directly or indirectly, as the result of such violation;
>
> * * * *

21 U.S.C. § 853(a)(1) (emphasis added). With regard to transfers of forfeitable assets, the statute provides:

> (c) *Third party transfers*
>
> All right, title and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant *may* be the subject of a special verdict of forfeiture and *thereafter shall* be ordered forfeited to the United States, unless the transferee establishes in

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[5] Because the restraining order rendered Monsanto indigent, the question of the forfeiture of assets that were *not* the subject of a Section 853(e)(1) proceeding appears not to be before us. I do note, however, that the government stated at oral argument that it will not seek forfeiture of such assets.

> a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

Id. § 853(c) (emphasis added).

Again, for the reasons set out at some length with regard to Section 853(e)(1), I would construe the word "may" to vest the district court with equitable discretion in imposing a forfeiture. Having read Section 853(e)(1) to require the exercise of discretion, Section 853(c) must be interpreted *in pari materia*. Otherwise, it would essentially nullify the district court's equitable authority to permit defendants to make ordinary lawful expentidures under Section 853(e)(1). For example, one can hardly imagine that any defense lawyer will be able to show that he or she "was reasonably without cause to believe that the property was subject to forfeiture. . . ." 21 U.S.C. § 853(c). As Judge Leval has explained:

> No one is more on notice of likelihood that the [tainted] money may come from . . . prohibited activity than the lawyer who is asked to represent the defendant in the trial of the indictment. If the statute applies to him, its message to him is "Do not represent this defendant or you will lose your fee." That being the kind of message lawyers are likely to take seriously, the defendant will find it difficult or impossible to secure representation.

United States v. Badalamenti, 614 F. Supp. 194, 196 (S.D.N.Y. 1985). Other potential providers of essential services may also be deterred from engaging in transactions with a highly publicized defendant. A surgeon or grocer who knows that a patient or customer is under indictment for narcotics trafficking may well have

"reasonable cause" to believe that his fees are being paid with tainted assets. *Cf. id.* If the district court's equitable authority to permit ordinary lawful expenditures is to be effective, payments to third parties made pursuant to that authority must be immunized from post-conviction forfeiture.

In any event, this construction is more consistent with the language of the statute than any other. The phrase "*may* be the subject of a special verdict of forfeiture" in Section 853(c) should be read to authorize the district court to exempt certain assets from post-conviction forfeiture in order to vindicate the court's authority under Section 853(e) or otherwise to prevent injustices to third parties. This construction in no way nullifies the phrase "*thereafter shall* be ordered forfeited" in Section 853(c). That simply means that forfeiture of third-party assets becomes mandatory only *after* the "special verdict of forfeiture" as to those assets has been returned. Nor does this reading of Section 853(c) defeat the mandatory language of Section 853(a), which by its terms applies only to "any person convicted" of the referenced crimes.

Accordingly, once a district court concludes that controlled expenditures may be made from assets otherwise restrained under Section 853(e)(1), those expenditures must be exempt from subsequent forfeiture under Section 853(c). Again, this interpretation is justified by traditional principles of statutory construction without regard to whether a different construction would implicate constitutional issues. Because a different construction would raise such issues by deterring surgeons, grocers, and lawyers from selling ordinary services and products to a defendant, however, a further reason for adopting my construction of the statute exists.

I therefore concur in the judgment of the court.

MINER, *Circuit Judge,* with whom Altimari, *Circuit Judge,* joins, concurring in part and dissenting in part:

While I agree with the panel majority that a post-indictment restraining order cannot be issued without the notice and hearing constitutionally required as a matter of fifth amendment due process, 836 F.2d 74, 83 (2d Cir. 1987), I hold the opinion that the procedural safeguards necessary to satisfy due process requirements here must be established by Congress rather than by this Court.

The provision for a pre-indictment restraining order, 21 U.S.C. § 853(e)(1)(B), stands in sharp contrast to the provision for a post-indictment restraining order, *id.* § 853(e)(1)(A). While the former requires notice and hearing prior to issuance of the order, the latter does not. That Congress intended to maintain this distinction is apparent from the legislative history: "[T]he probable cause established in the indictment . . . is to be determinative of any issue regarding the merits of the government's case on which the forfeiture is to be based." S. Rep. No. 225, 98th Cong., 2d Sess. 203, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3386. Expressly rejected, according to the Senate Report, was the holding in *United States v. Crozier,* 674 F.2d 1293 (9th Cir. 1982), *vacated,* 468 U.S. 1206 (1984), which requires the government to satisfy the standards of Fed. R. Civ. P. 65 in order to obtain a post-indictment restraining order. S. Rep. No. 225, *supra,* at 195-196 & n.20, 1984 U.S. Code Cong. & Admin. News at 3378-79 & n.20.

The forfeiture statute is defective in failing to provide for notice and hearing at least *following* the issuance of a restraining order in the post-indictment context. The Supreme Court has held that an *in rem* seizure of a yacht carrying illegal narcotics is permissible on an *ex parte* application, in light of the significant governmental interest involved, *provided* that a post-seizure hearing is conducted. *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 676-80 (1974). I see no difference between "seizure" and "restraint," since both deprive an owner of access to or use of his property. The same fifth amendment constraints should apply in either case.

It seems to me, however, that the hearing procedure established in such great detail by the panel majority is beyond our power to create. It simply is not our place, in the face of contrary congressional intent, to provide for a hearing and to spell out the process that is due. Such specific procedural matters as the burden of proof are better left for legislative determination after a finding of unconstitutionality. "The nature and form of such . . . hearings . . . are legitimately open to many potential variations and are a subject, at this point, for legislation—not adjudication." *Fuentes v. Shevin,* 407 U.S. 67, 96-97 (1972). In this case, the panel majority not only has added an entire procedure that Congress specifically has rejected; it also has eliminated something that Congress specifically provided for by deciding that there can be no post-trial forfeiture of attorney's fees if the restraining order is lifted.

Having relied on the fifth amendment to declare the post-indictment restraint provision unconstitutional for failure to require notice and hearing, I do not consider the issue of post-conviction fee forfeiture ripe for review. There is nothing in the record to indicate that no lawyer would take the case if he were paid at its inception with funds subject to *possible* forfeiture after conviction. Monsanto's problem is that he could not retain counsel of his choice after his assets were restrained. Whether he could have done so if the funds had been available to him in the first instance is not the case before us.

I therefore concur in the *per curiam* opinion to vacate the restraining order so as to permit Monsanto access to

the restrained assets to the extent necessary to pay legitimate attorney's fees for the defense of the pending criminal charges. I decline to join in the declaration that such fees shall be exempt from post-conviction forfeiture under the provisions of 21 U.S.C. § 853(c).

MAHONEY, *Circuit Judge*, with whom Judges Cardamone and Pierce join except as to Section D of this opinion, dissenting:

I respectfully dissent, and would decide the in banc appeal in accordance with the majority opinion in the original panel determination reported at 836 F.2d 74 (2d Cir. 1987), familiarity with which is assumed. The case is here on appeal from denial of a motion to vacate or modify a post-indictment restraining order (1) to permit appellant Peter Monsanto to use restrained assets to retain private trial counsel, and (2) to exempt legal fees paid to such counsel from post-trial forfeiture.

The panel majority read the pertinent statute, 21 U.S.C. § 853(a) through (e) (Supp. IV 1986), enacted as part of the Comprehensive Forfeiture Act of 1984 ("CFA"), to authorize restraining orders which would freeze assets needed to pay a defendant's counsel of choice, and concluded that this resulted in no constitutional violation so long as a pre-trial adversarial hearing was provided at which the government established, "by evidence independent of the indictment, a probability of convincing a jury beyond a reasonable doubt both that the defendant has violated the statute and that the assets are subject to forfeiture." *United States v. Monsanto*, 836 F.2d 74, 83 (2d Cir. 1987) (citations ommitted).[1] The majority further

[1] Although the requirement of proof beyond a reasonable doubt as to forfeitability of assets is the majority rule, we note that *United States v. Sandini*, 816 F.2d 869, 874-75 (3d Cir. 1987), requires only proof by a preponderance of the evidence, relying in part on our ruling in *United States v. Grammatikos*, 633 F.2d 1013, 1025 (2d Cir. 1980), that forfeiture is not an element of the criminal offense, but simply an additional penalty therefor.

ruled that if the government failed to prevail at the pre-trial hearing, the assets in question would not be subject to recapture after payment to counsel as legal fees, whatever the outcome of the trial. The hearing mandated by the panel majority was conducted on remand, the government prevailed, and Peter Monsanto is now on trial with his sixteen codefendants, all of whom (including Monsanto) are represented by counsel appointed pursuant to 18 U.S.C. § 3006A (Supp. IV 1986).

The in banc majority now concludes in a per curiam opinion that the panel majority erred, and that Mansanto was entitled to pay counsel of choice from the restrained assets. No majority unites behind a single rationale supporting that result. Rather, there are varying combinations of votes for four concurring opinions. These opinions conclude that the statute requires this result (concurring opinion of Judge Winter), the sixth amendment requires it (concurring opinion of Chief Judge Feinberg), both the fifth and sixth amendments require it (concurring opinion of Judge Oakes), and finally, that the panel majority exceeded its authority by adding a hearing requirement to the statute, although if the statute called for a hearing it would pass constitutional muster (concurring opinion of Judge Miner). These opinions, and the issues they raise, will be considered seriatim.

A. *The Statutory Issue (concurring opinion of Judge Winter).*

The issue whether 21 U.S.C. 853 (Supp. IV 1986) authorizes an exemption from pre-trial freeze orders of sufficient assets to pay for counsel of choice has been con-

sidered by a number of circuit courts. Although they have divided on the constitutional issue, these courts have unanimously decided, with one exception that is now under in banc review, that the statute cannot be read to reach that result.

The Fourth Circuit so ruled in *In Re Forfeiture Hearing as to Caplin & Drysdale,* 837 F.2d 637 (4th Cir. 1988) (in banc). *See id.* at 641-42; *id.* at 651 (Phillips, J., dissenting). The Tenth Circuit so ruled in *United States v. Nichols,* 841 F.2d 1485 (10th Cir. 1988). *See id.* at 1491-96; *id.* at 1509 (Logan, J., dissenting). The panel opinion in this circuit, *United States v. Monsanto,* 836 F.2d 74 (2d Cir. 1987), was unanimous on this point. *See id.* at 78-80; *id.* at 85-86 (Oakes, J., dissenting). The Fifth Circuit ruled in *United States v. Thier,* 801 F.2d 1463 (5th Cir. 1986), *modified,* 809 F.2d 249 (5th Cir. 1987), that the statute should be read to authorize, although not mandate, an exemption for attorney's fees, and this ruling was reaffirmed in *United States v. Jones,* 837 F.2d 1332 (5th Cir. 1988). One judge concurred in *Jones,* however, only because constrained by *Thier,* and expressed his preference for the contrary rule of the Second and Fourth Circuits. *Id.* at 1336 (Davis, J., concurring). The Fifth Circuit has since decided to reconsider *Jones* in banc. *United States v. Jones,* 844 F.2d 215 (5th Cir. 1988).

Most of the analyses in these cases have been directed to subdivisions (a) and (c) of 21 U.S.C. § 853 (Supp. IV 1986), and have concluded that since subdivision (a) extends to "any property" obtained from or used for criminal violations, and since subdivision (c) calls for recapture of such property from all transferees except bona fide purchasers, a category unlikely to include defense counsel who would presumably be on notice concerning any government claims as to forfeiture, the statute does not authorize an exemption for attorney's fees. *See,*

e.g., In Re Forfeiture Hearing as to Caplin & Drysdale, 837 F.2d at 641-42. Judge Winter, however, directs his attention exclusively to subdivision (e)(1)(A) of this section, which provides:

> Upon application of the United States, the court *may* enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to *preserve the availability of property described in subsection (a) of this section for forfeiture under this section*–
>
> A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II of this chapter for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section. . . .

21 U.S.C. § 853(e)(1)(A) (Supp. IV 1986) (emphasis added).

Judge Winter's analysis is that: (1) the use of the word "may" in this subdivision vests discretion in a court from which a restraining order is sought under this section; (2) that discretion is to be guided by traditional equitable principles that balance the relative hardship to the parties; and (3) a review of the legislative history establishes that "[t]he government has no interest derived from the [Comprehensive Forfeiture] Act in preventing a defendant from making ordinary lawful expenditures during the period from indictment to conviction, including expenditures for the retention of private counsel." In reaching this conclusion, Judge Winter's opinion includes no citation of or reference to any of the many cases that have construed this statute, excepting only a confession that he is "frankly puzzled" that none of them has read the statute as he does.

To begin with, it is obviously appropriate, before consulting the legislative history, to look to the language of subdivision (e)(1)(A) to ascertain its purpose. *See, e.g., Russello v. United States,* 464 U.S. 16, 20 (1983). All of the options which a court "may" pursue pursuant to that provision as directed by its unambiguous language to one express purpose: "to preserve the availability of property described in subsection (a) of this section for forfeiture under this section." 21 U.S.C. § 853(e)(1) (Supp. IV. 1986) It is accordingly beyond dispute that *any* transfer to a third party of property otherwise subject to a restraining order frustrates, to the precise extent of the property transferred, the expressly stated statutory purpose. It also follows that, however one balances the competing statutory and other interests, it is a transparently wrong reading of the statute to conclude, as Judge Winter does, that the government has "no interest derived from the [Comprehensive Forfeiture] Act" in preventing such transfers, or that "[t]he mere fact that the assets ultimately forfeited after conviction may be less than if a total pre-conviction restraint had been imposed does not . . . contravene any purpose of the Act."

The legislative history of the statute is equally clear as to its purpose. For example, the pertinent Senate report states that: "The *sole purpose* of the bill's restraining order provision, like that in the current RICO and CCE statutes, is to preserve the status quo, *i.e.,* to assure the availability of the property pending disposition of the criminal case." S. Rep. No. 225, 98th Cong., 1st Sess. 204, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3387 (emphasis added) (hereinafter "Senate Report"). The overall statutory purpose is described in these terms: "both to preserve the availability of a defendant's assets for criminal forfeiture and, in those cases in which he does transfer, deplete, or conceal his property, to assure that he cannot

as a result avoid the economic impact of forfeiture." Senate Report 196. Judge Winter, however, completely disregards the first of these two passages (*i.e.,* Senate Report 204), thus enabling him to characterize the second (Senate Report 196) as the "*only* passage [in the legislative history] remotely supporting a . . . view" (emphasis added) contrary to his concerning the statutory purpose. I would suggest, however, that in addition to the quite clear meaning of the foregoing passages from the legislative history and the statutory language, the following quotation from the primary report of the House of Representatives concerning the CFA severely undermines the notion that Congress was concerned only with those asset depletions that, as Judge Winter puts it, "enable a defendant to avoid the economic impact of a *post-conviction* forfeiture" (emphasis in original):

> One highly publicized case, although anecdotal, is illustrative of the problem. That case was *United States v. Meinster* et al. (Case No. 79-105-CR-JKL, Southern District of Florida). In this prosecution, commonly called the "Black Tuna" case, a Florida based criminal organization had imported over a million pounds of marijuana and grossed about $300 million over a 16-month period. The Federal Government completed a successful prosecution in which the three primary defendants were convicted and this major drug operation was aborted. However, forfeiture was attempted on only two residents [sic] worth $750,000, an auto auction business used as a "front" and five yachts.
>
> Of the $750,000 for the residences, $175,000 was returned to the wife of one of the defendants, *and $559,000 was used to pay the defendant's attorneys.* The auto auction business was worthless and the five yachts were never found.

The Government wound up with $16,000.

This was an organization that lived in the "fast lane" of privately owned jets, half million dollar yachts and $60,000 in restaurant bills. Although there are many interrelated reasons for the Government's lack of success on the economic level, it is obvious that a considerable amount of the "proceeds" of this drug operation are elsewhere, probably funding future "Black Tunas."

It is against this background that present Federal forfeiture procedures are tested and found wanting.

H.R. Rep. No. 845, Part 1, 98th Cong., 2d Sess. 3 (1984) (emphasis added).

I have no quarrel with Judge Winter's conclusion that the use of the word "may" in 21 U.S.C. § 853(e)(1)(A) (Supp. IV. 1986) brings a trial court's traditional equity powers into play. These powers are to be exercised, however, in the context provided by the statute as Congress wrote it. It is one thing to conclude that a district court might, in a given case, allow the invasion of restrained assets to pay a grocer's bill, or provide emergency surgery. It is quite another to conclude that the statute authorizes the rather massive financial outlays often necessary to pay private defense counsel in RICO and CCE prosecutions, and precludes any exercise of a judge's discretion ever to inhibit such a payment, so long as it is not "sham."[2]

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[2] Judge Winter reads the paragraph to which this footnote is appended as (a) a major departure from the original panel opinion, 836 F.2d 74 (2d Cir. 1987), and (b) significantly narrowing the differences between our views. I respectfully disagree. As to (a), the panel opinion did not address the individualized discretion authorized by the use of the word "may" in 21 U.S.C. § 853(e)(1)(A) because it was deemed irrelevant to Monsanto's wholly unparticularized contention that, either as a matter of statutory construction or constitutional right, *any* defendant must *always* be allowed to use otherwise restrainable assets for non-sham attorney's fees. As to (b), Judge Winter accepts Monsanto's position as thus stated, and I reject it.

In sum, it is hardly a credible reading of the congressional purpose, given the explicit statutory language and clear legislative history, to conclude that Congress was entirely indifferent to, or intended to create a special exemption for, the use of restrainable assets for attorney's fees. Rather, as most of the circuit courts that have considered the matter have concluded, the statutory issue is not fairly in doubt. This brings us to the question of constitutionality.

B. ***The Constitutional Issue (concurring opinions of Chief Judge Feinberg and Judge Oakes).***

The rationale of the panel majority concerning the constitutional issue was expressed as follows:

> Requiring an adversarial hearing, at which the government has the burden to demonstrate the likelihood that the assets are forfeitable, will provide a procedural check against the governments' discretion to limit CCE and RICO defendant's choice of counsel simply by obtaining a forfeiture charge in the indictment. If the government cannot demonstrate the likelihood that a jury would find the assets to be the proceeds of crime, the interest of the defendant in using the property to retain counsel of choice should prevail. . . .
>
> In the event the district court finds that the government has not met its burden and lifts the retraining order, moreover, we think the district court should also order that any funds thereafter used to pay legitimate attorney's fees be exempt from any future post-trial forfeiture. . . . At the pre-trial stage, where

the defendant is presumed innocent, we hold that if the government cannot make a sufficient showing to justify a restraining order, the defendant should not have to bear the risk that private counsel will still be deterred by the prospect of disgorging attorney's fees after trial. To the extent that some funds ultimately found to be forfeitable at trial will remain in the hands of attorneys, we view this as a necessary cost in this difficult balance between the interests of the government and defendant's sixth amendment right to counsel of choice.

On the other hand, if the government meets its burden at the hearing, we conclude that the defendant has no sixth amendment right to exemption of assets earmarked for attorney's fees either from pre-trial restraint or from post-conviction forfeiture. Once the government has established a likelihood that the assets are indeed forfeitable, the case is more analogous to the situation in which a defendant is denied access to contraband that is manifestly subject to the interest of someone other than the accused. The right to retain private counsel of choice is not absolute; and, in the event that the defendant does not prevail at a post-restraint hearing, he is still guaranteed appointed counsel under the sixth amendment. We see no constitutional principle requiring that a defendant whose ability to pay private counsel results solely from the possession of property which he has acquired by criminal activity, which property Congress has declared to be forfeitable, must be placed in a position preferable to that of an indigent defendant who does not have such property at his disposal.

836 F.2d at 84-85 (footnote omitted).

The trial in which Peter Monsanto is presently engaged is a stark illustration of this rationale. There are seventeen

defendants in that trial, *all* of whom (including Mansanto) have appointed counsel. The opinions of Chief Judge Feinberg and Judge Oakes hold, although they don't put it exactly this way, that representation of Monsanto's sixteen codefendants by appointed counsel poses no constitutional problem, but that the constitution cannot countenance the restraint of assets which Monsanto wants to spend for private counsel, even though the indictment returned by the grand jury charges that those assets are forfeitable under the CFA because derived from illegal drug dealing, and Judge Ward found it probable, after an adversarial pre-trial hearing, that the government would prove this beyond a reasonable doubt.

In view the situation as does the Fourth Circuit:

> We. . . decline . . . to accord this class of criminal defendants a unique and favored constitutional status. Such a rule would constitutionally prefer the drug merchant with none but illicit assets not only to indigent defendants but to defendants with untainted assets, who must sacrifice them to secure the counsel of their choice.

In Re Forfeiture Hearing as to Caplin & Drysdale, 837 F.2d 637, 646 (4th Cir. 1988) (in banc).

Or as the Tenth Circuit put it:

> It is hard to conceive of a legal system in which appointed counsel is routinely adequate in a death penalty case, but is somehow inadequate in a case involving "the career criminal millionaire who purchases cars, businesses, and real estate with cash delivered to banks in suitcases. "*[Forfeiture of Narcotics Proceeds: Hearings Before the Subcomm. on Criminal Justice of the Senate Comm. on the Judiciary,* 96th Cong., 2d Sess 1 (1980)] (statement of Sen. Biden).

United States v. Nichols, 841 F.2d 1485, 1507 (10th Cir. 1988).

Especially in view of these subsequent decisions, I see no reason to depart from the conclusion of the panel majority that the "freeze" provisions of the CFA are constitutional, provided that an appropriate pre-trial hearing is required with respect to the assets sought to be restrained. Accordingly, I next consider Judge Miner's concurring opinion, which holds that the panel majority exceeded its authority in requiring such a hearing.

C. *The Requirement of a Hearing (concurring opinion of Judge Miner).*

Judge Miner "agree[s] with the panel majority that a post-indictment restraining order cannot be issued without the notice and hearing required as a matter of fifth amendment due process, . . . [but] hold[s] the opinion that the procedural safeguards necessary to satisfy due process requirements here must be established by Congress rather than by this Court." Here again, Judge Miner does not acknowledge in any way the decisions in other circuits which, faced with the identical question, have required a pre-trial hearing as a matter of due process, *see United States v. Harvey*, 814 F.2d 905, 928-29 (4th Cir. 1987), *rev'd sub. nom. In Re Forfeiture Hearing as to Caplin and Drysdale*, 837 F.2d 637 (4th Cir. 1988) (in banc); *United States v. Crozier*, 777 F.2d 1376, 1382-84 (9th Cir. 1985); *United States v. Lewis*, 759 F.2d 1316, 1324-25 (8th Cir.), *cert. denied*, 474 U.S. 994 (1985); *United States v. Spilotro*, 680 F.2d 612, 616-19 (9th Cir. 1982); *United States v. Long*, 654 F.2d 911, 915-16 (3d Cir. 1981), or of statutory interpretation; *see United States v. Thier*, 801 F.2d 1463, 1466-70 (5th Cir. 1986), *modified*, 809 F.2d 249 (5th Cir. 1987).

It is perfectly clear, furthermore, that the hearing required by the *Monsanto* panel majority is not in conflict with the statute. Section 853(e)(1)(A) provides that a court "may" enter a restraining order or injunction, or require a bond, or take other action to preserve the property. If the court "may" take such action, then presumably, as Judge Winter stresses, it also "may" decide not to take such action. Since the court is thus charged with the duty of exercising its discretion one way or the other, it must inherently have the authority to obtain sufficient information to exercise that discretion wisely. Both logically and traditionally, when a court needs information it holds a hearing. As a matter of fact, the legislative history quoted by Judge Miner, two sentences prior to the sentence he quotes, states that "[t]his provision [21 U.S.C. § 853(e)(1)(A)] does not exclude . . . the authority to hold a hearing subsequent to the initial entry of the order. . . ." Senate Report 203.

The "stark contrast" which Judge Miner discerns between the provision for a pre-indictment restraining order, 21 U.S.C. § 853(e)(1)(B), which requires a hearing, and the provision for a post-indictment restraining order, 21 U.S.C. § 853(e)(1)(A), which does not, is easily explained. The authorization of pre-indictment restraining orders was sufficiently novel to call for a specific description of the hearing process needed, a description that was not necessary for the more familiar situation of obtaining a preliminary injunction in a proceeding that was already pending. In any event, there is no need for speculation, since the legislative history quoted above unequivocally establishes that Congress did not, in enacting these provisions, exclude a district court's normal and traditional authority to hold a hearing with respect to a post-indictment restraining order. Furthermore, a prior decision of this court explicitly recognizes that such hearings

are not only authorized, but will routinely and normally occur. *See United States v. Gelb,* 826 F.2d 1175, 1176-77 (2d Cir. 1987) (per curiam).

Judge Miner points to the rejection, at Senate Report 196 n.20, of *United States v. Crozier,* 674 F.2d 1293 (9th Cir. 1982), *vacated,* 468 U.S. 1206 (1984), as supportive of his position. *Crozier* was rejected, however, because the rule stated in that case would "allow the courts to entertain challenges to the validity of the indictment, and require the government to put on its witnesses well in advance of trial. . . ." Senate Report 196.

The panel majority opinion addressed the problem of premature disclosure of witnesses by holding that a district court would not be bound by the Federal Rules of Evidence, and could thus admit hearsay, at a post-indictment, pre-trial adversary hearing to continue a restraint on assets. *United States v. Monsanto,* 836 F.2d at 85; *see also* 21 U.S.C. § 853(e)(3) (Supp. IV 1986). The panel majority also concluded, however, that "challenges to the validity of the indictment" were appropriate, holding that due process required the government to establish at a pre-trial hearing, "by evidence independent of the indictment, a probability of convincing a jury beyond a reasonable doubt both that the defendant has violated the statute and the assets are subject to forfeiture. . . ." *United States v. Monsanto,* 836 F.2d at 83.

It is thus clear that the *Monsanto* panel majority did not impose a hearing requirement that is at odds with the Congressional mandate. Rather, it provided for a hearing which the statute and the pertinent legislative history clearly envisioned, as the Second Circuit has previously recognized, but rejected only the indications in the legislative history that at such a post-indictment hearing, a court must accept the indictment as "determinative of any

issue regarding the merits of the government's case on which the forfeiture is to be based." *See* Senate Report 203.

This was clearly an appropriate, indeed obvious, exercise of the normal judicial function, as the five other circuits to consider the matter have concluded. This is especially the case since the repudiation in the Senate Report of *United States v. Crozier,* a case which required a pre-trial hearing as a matter of fifth amendment due process, *see* 674 F.2d at 1297, does not address the sixth amendment issue on which the panel majority ruled here, *see United States v. Monsanto,* 836 F.2d at 82 n.7, and the legislative history clearly evidences a congressional intent to leave the resolution of the sixth amendment issue to the courts. *See* H.R. Rep. No. 845, Part 1, 98th Cong., 2d Sess. 19 n.1 (1984).

Judge Miner relies on *Fuentes v. Shevin,* 407 U.S. 67, 96-97 (1972), to reach a contrary conclusion. That case held that the Supreme Court would not, in the first instance, legislate broad new hearing procedures for the replevin statutes of Florida and Pennsylvania. It hardly precludes the application of normal due process standards by the federal courts to pre-trial hearings, which Congress specifically authorized and envisioned, in the course of federal criminal litigation.

D. ***Post-trial Forfeiture.***

Since the motion whose denial is on appeal sought both permission for Monsanto to use the restrained assets to retain private legal counsel, and exemption of legal fees paid to that counsel from post-trial forfeiture, I would reach the latter question and rule, as did the panel majority, that such exemption is appropriate as to assets which are the subject of a pre-trial hearing at which the government does

not prevail. Permitting post-trial forfeiture of attorney's fees would have the effect of discouraging attorneys from representing RICO and CCE clients in the first place, and thus would threaten to deny such defendants counsel of their choice regardless of the outcome of the pre-trial hearing. This rule, of course, stops well short of the per curiam ruling that Mansanto is to be provided access to the restrained assets to whatever extent is necessary to pay non-sham legal fees, and that assets so used are exempt from subsequent forfeiture.

E. Conclusion.

I would be less than candid if I failed to express my disappointment that, except for a passing reference by Chief Judge Feinberg, the concurring opinions of my colleagues never address, or even acknowledge, directly pertinent cases from our sister circuits which reach contrary results on the precise issues considered here. We are, of course, free to go our own way. But it would seem to me that the considered views of other circuits are at least entitled to our respectful consideration. As was stated in *Keasler v. United States*, 766 F.2d 1227 (8th Cir. 1985):

> "Although we are not bound by another circuit's decision, we adhere to the policy that a sister circuit's reasoned decision deserves great weight and precedential value. As an appellate court, we strive to maintain uniformity in the law among our circuits, whenever reasoned analysis will allow."

Id. at 1233 (quoting *Aldens, Inc. v. Miller*, 610 F.2d 538, 541 (8th Cir. 1979), *cert. denied*, 446 U.S. 919 (1980)). *See also Am. Medical Int'l, Inc. v. Secretary of HEW*, 677 F.2d 118, 123 (D.C. Cir. 1981); *Fed. Life Ins. Co. v. United States*, 527 F.2d 1096, 1098-99 (7th Cir. 1975); and

Cosentino v. Local 28, Int'l Org. of Masters, Mates and Pilots, AFL-CIO, 268 F.2d 648, 652 (8th Cir. 1959).

I stress that no special or individualized circumstances are presented for our consideration on this appeal. Rather, we are asked to provide a blanket rule exempting from forfeiture all assets required for non-sham counsel fees. Because I find all of the concurring opinions which reach that result unpersuasive and, in their virtually total disregard of every pertinent opinion from our sister circuits, surprisingly insular, I respectfully dissent.

PIERCE, *Circuit Judge*, with whom Judge Cardamone joins, concurring in part and dissenting in part:

For substantially the reasons set forth in the original panel opinion in *United States v. Monsanto*, 836 F.2d 74 (2d Cir. 1987), and in all but Section D of Judge Mahoney's separate opinion herein, I would hold (1) that 21 U.S.C. § 853(e)(1)(A) (Supp. IV 1986) authorizes the post-indictment, pretrial restraint of assets that otherwise would be utilized to retain an attorney; (2) that such a restraint violates the defendant's qualified sixth amendment right to counsel of choice, unless at a pretrial adversarial hearing the government establishes, "by evidence independent of the indictment, a probability of convincing a jury beyond a reasonable doubt both that the defendant has violated the statute and that the assets are subject to forfeiture," *Monsanto*, 836 F.2d at 83; and (3) that the district court has the authority to hold the requisite pretrial hearing. Accordingly, I respectfully dissent from the per curiam opinion to the extent that it remands this matter with instructions that the district court release whatever funds are necessary for Monsanto to retain counsel of choice. I believe that the original panel majority was correct to remand with instructions that the district

court conduct an appropriate pretrial hearing "at which the government will have the burden of establishing the probability that Monsanto will be convicted at trial and the . . . properties in question will be subject to forfeiture." *Id.* at 85.

I concur in the per curiam opinion, however, to the extent that it exempts from post-conviction forfeiture any bona fide fees actually paid to Monsanto's counsel. I agree with the original panel majority's observation that "the *threat* of post-conviction third party forfeiture . . . may effectively prevent a defendant from being able to retain counsel of choice." *Id.* at 84 (emphasis in original). I would therefore exempt from post-conviction forfeiture any assets that have not been the subject of a valid pretrial retraining order and that have been used to pay bona fide legal fees; to hold otherwise would provide the government with the ability to limit a defendant's choice of counsel, at the pretrial and trial stages, without the necessity of demonstrating in advance the likely forfeitability of the subject assets. To the extent the majority today invalidates the particular restraining order at issue in this case and rejects the possibility of any legitimate pretrial restraint that infringes upon the right to counsel of choice, I would hold that any legitimate fee paid to Monsanto's attorney not be subject to post-conviction forfeiture.

CARDAMONE, *Circuit Judge*, with whom PIERCE, *Circuit Judge*, joins; *concurring in part; dissenting in part*

I fully concur in the en banc dissenting opinion of Judge Pierce and I concur in the dissenting opinion of Judge Mahoney for substantially the same reasons set forth in the original panel majority opinion in *United States v. Monsanto*, 836 F.2d 74 (2d Cir. 1987), except for part

"D". Instead, I concur in the per curiam opinion insofar as it holds that bona fide fees actually paid to counsel are exempt from post-conviction forfeiture because otherwise, as Judge Pierce notes, the government by threat of forfeiture after conviction could severely limit a defendant's choice of counsel at the pre-trial and trial stages of the prosecution.

The broad remedial language of the statute which authorizes post-indictment pre-trial restraint of potentially forfeitable assets contains no intimation that it does not reach legitimate attorneys' fees, *see* 21 U.S.C. § 853(a)(1), (b), (c), (e)(1)(A) (Supp. IV 1986). The legislative history does not support the claim that Congress excluded legitimate attorneys' fees from the forfeiture provisions, *see* S. Rep. No. 225, 98th Cong., 1st Sess. 198-201, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3381-84 (describing provisions of 18 U.S.C. § 1963 identical to those of 21 U.S.C. § 853). Insofar as Congress considered the issue, it left it for the courts to decide. *See* H.R. Rep. No. 845, Part 1, 98th Cong., 2d Sess. 19 & n.1 (1984) (report accompanying draft of 1984 CCE forfeiture amendments). Consequently, the original panel's unanimous view – endorsed by *amici* for Monsanto – that the statute reaches legitimate attorneys' fees is one that I adhere to. *See In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F.2d 637, 641-42 (4th Cir. 1988) (*en banc*) (same view of statute); *United States v. Nichols*, 841 F.2d 1485 (10th Cir. 1988) (same).

Further, the use of the word "may" in 21 U.S.C. § 853(e)(1), should be read sensibly to allow for certain invasions into otherwise restrainable assets. It is appropriate therefore to allow a district court to provide for subsistence, necessary medical care, shelter costs, and *court-appointed* counsel for an accused possessing questionable

assets because these necessary expenses justify such an invasion for those assets. In light of the broad remedial purposes and liberal construction of the statute, *see* § 853(o), it is hard to imagine that the statute, on its own terms, strictly limits these legitimate expenses, but permits unlimited legal expense. The adversarial hearing held to be a "reasonable compromise" by the *Monsanto* majority, 836 F.2d at 82-85, provides procedural safeguards sufficient to satisfy Fifth Amendment due process concerns. Moreover, the hearing mandated by the *Monsanto* panel majority, 836 F.2d at 83, satisfies the qualified Sixth Amendment right to counsel of choice and a district court has authority under the statute to conduct such a hearing.

To the extent that the filed opinions of my other colleagues disagree with the above, I respectfully dissent from their views.

PRATT, *C.J.*, concurring in part and dissenting in part.

I concur in the per curiam opinion insofar as it reverses the order of the district court and remands the case, but I respectfully dissent from so much of the per curiam as directs the district court to modify the restraining order to permit Monsanto access to the restrained assets to pay his attorney's fees, as well as from that part of the per curiam that declares fees paid to Monsanto's defense counsel exempt from subsequent forfeiture.

With respect to some of the varying views expressed by some of my colleagues:

A. *Counsel of choice.*

I do not agree with Chief Judge Feinberg, Judge Oakes, and Judge Kearse that the restraint of assets in Monsanto's

possession violates a right to counsel of choice under the sixth amendment. The predominant function of the sixth amendment is to guarantee an effective advocate for a criminal defendant, not to insure that the defendant will be represented by the lawyer he prefers. *Wheat v. United States*, ____ U.S.__, __, 108 S.Ct. 1692, 1697 (1988). Any qualified right to choose one's own counsel is "circumscribed in several important respects." *Wheat v. United States*, at __, 108 S.Ct. at 1697. For example, a defendant may not choose an advocate who is not a member of the bar, *id.*, and multiple defendants may not be represented by the same counsel where such representation would entail a conflict of interest, *Holloway v. Arkansas*, 435 U.S. 475, 484, 98 S.Ct. 1173, 1178 (1978). Perhaps even more significantly, only those defendants who are "financially able" could enjoy this qualified right to counsel of choice. *See Morris v. Slappy*, 461 U.S. 1, 23, 103 S. Ct. 1610, 1622 (1983) (Brennan, J., concurring); *see also Wheat v. U.S.*, __ U.S. at __, 108 S. Ct. at 1697; *United States ex rel. Davis v. McMann*, 386 F.2d 611, 618 (2d Cir. 1967); *United States v. Friedman*, No. 87-3088, slip op. (D.C. Cir. June 17, 1988).

B. *Due process and a hearing.*

I agree with the view expressed by Judge Cardamone, Judge Pierce, and Judge Mahoney that a hearing is necessary to meet constitutional due process standards for pretrial restraint of assets in a defendant's possession. I also agree that authority for the hearing may be found in the constitutional need. I would also find authority for that hearing, however, in the discretionary language of the statute. Section 853(e)(1) states that "the court *may* enter a restraining order or injunction • • • or take any other action to preserve the availability of property • • •" (emphasis added). In order to obtain the information

necessary to determine whether or not to enter such a restraining order or injunction, the district court necessarily would have the authority to conduct such a hearing.

C. *Defendant's lawful expenditures.*

I disagree with Judge Meskill, Judge Newman, and Judge Winter, who view the same discretionary term "may" as guaranteeing to defendant use of funds in his possession for "ordinary lawful expenditures" including legal counsel. *See United States v. Monsanto*, (Winter, C.J., concurring at 9). I am unable to understand why principles of equitable jurisprudence even authorize, much less require, extension of the court's equitable protection to a criminal defendant against whom the government has shown both a likelihood of conviction and a likelihood of proof that the property he possesses was illegally acquired. Where are the defendant's "clean hands" normally thought to be a prerequisite to equitable protection?

D. *Post-conviction forfeiture.*

I agree with Judge Miner and Judge Altimari that the issue of post-conviction forfeiture under the statute is not ripe for review. Because there are so many open questions, I think it is unwise for this court to give an advisory opinion on the subject of post-conviction forfeiture of assets that might otherwise have been paid, or might yet be paid, to legal counsel. If the defendant is convicted and his property declared forfeited by the jury, would bona fide legal fees paid to counsel on appeal of the conviction also be exempt? If so, must they be paid before the forfeiture is decreed, i.e.: in advance of conviction? Or must the government's seizure of the property it owns by virtue of this statute be made subject to all claims of counsel for future litigation fees? *See United States v. Friedman*, No.

87-3088, slip op. (D.C. Cir. June 17, 1988) (defendant proceeding in forma pauperis is not entitled to release of assets that were declared forfeited after conviction solely for the purpose of retaining counsel to represent him on appeal). Does the protection sought to be accorded to bona fide attorney's fees extend only to the particular case in which the forfeiture is ordered? Or would it extend to fees paid defending other criminal actions brought against the same defendant? Since the issue is inevitably complex and since whatever we say about it is dictum, I think we should refrain from expressing our views until it is necessary to do so in a proper case with a fully developed factual picture.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 436, Docket 87-1397

UNITED STATES OF AMERICA, APPELLEE

v.

PETER MONSANTO, DEFENDANT-APPELLANT

Argued: October 20, 1987
Decided: December 21, 1987
Rehearing In Banc Granted
Jan. 29, 1988.

Before: OAKES, CARDAMONE, and MAHONEY, *Circuit Judges.*

MAHONEY, Circuit Judge:

This is an expedited interlocutory appeal from an order of the United States District Court for the Southern District of New York, Robert J. Ward, *Judge,* denying a motion to vacate or modify an *ex parte* post-indictment restraining order entered by John F. Keenan, *Judge*, pursuant to a provision of the Comprehensive Forfeiture Act of 1984 ("CFA"), 21 U.S.C. § 853(e)(1)(A) (Supp. III 1985). The restraining order prohibits defendant Peter Monsanto from alienating or in any way depreciating two parcels of real property that were specified in an indictment as "constituting and derived from the proceeds" of

violations of Title III of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 801 *et seq.* (1982 and Supp. III 1985). Monsanto challenges the application of the CFA to this property, which he claims to need in order to retain counsel of choice for his pending trial on substantive RICO, RICO conspiracy, narcotics conspiracy, Continuing Criminal Enterprise ("CCE") and firearms charges.

Monsanto argues that Congress did not intend the CFA to apply to property needed to pay for legitimate attorney's fees. He contends, moreover, that if Congress did intend the CFA to apply to property needed for that purpose, the statute would then violate the qualified sixth amendment right to counsel of choice. Monsanto challenges not only the post-indictment restraint provision, 21 U.S.C. § 853(e)(1)(A) (Supp. III 1985), but also the post-conviction "relation back" provision, 21 U.S.C. § 853(c) (Supp. III 1985), which allows the government to seek post-conviction forfeiture of property transferred to a third person. The latter provision, Monsanto contends, deters private counsel from representing defendants as long as there is a threat that attorney's fees will be subject to forfeiture in the event of conviction.

Background

In an indictment unsealed on July 8, 1987, Monsanto was charged with one substantive RICO count, 18 U.S.C. § 1962(c) (1982), one RICO conspiracy count, 18 U.S.C. § 1962(d) (1982), one conspiracy to distribute narcotics count, 21 U.S.C. § 846 (1982), one CCE count, 21 U.S.C. § 848 (1982 & Supp. III 1985), and four illegal possession of a firearm counts, 18 U.S.C. Appendix § 1202(a)

(1982).[1] The indictment also specified two parcels of residential real property, valued at $335,000 and $30,000, as well as $35,000 in cash, as being subject to forfeiture under 21 U.S.C. § 853(a) (Supp. III 1985). On the same day, Judge Keenan entered an *ex parte* restraining order, 21 U.S.C. § 853(e)(1)(A) (Supp. III 1985), prohibiting Monsanto from directly or indirectly transferring or encumbering the residential properties.[2]

At the initial pre-trial conference before Judge Ward on July 31, 1987, James Merberg, an attorney from Boston, audited the proceedings but declined to enter a formal appearance on behalf of Monsanto. The court was informed by the Assistant United States Attorney ("AUSA") that "[Merberg] and Mr. Monsanto are exploring the circumstances under which he would be retained." At a later conference on August 6, 1987, Edward M. Chikofsky, counsel *pro tem* appearing on behalf of Monsanto for the limited purpose of presenting Monsanto's challenge to the forfeiture provisions, informed Judge Ward that the threat of forfeiture of attorney's fees was specifically what deterred Mr. Merberg from representing Monsanto. Although Merberg did not attend this conference, the AUSA described his own discussions with Merberg concerning a possible agreement by the government not to seek forfeiture of attorney's fees. The AUSA stated that the government would not enter into such an agreement.

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[1] This section was repealed effective November 15, 1986 by Pub.L. No. 99-308, § 104(b), 100 Stat. 459 (1986). All the violations of this section with which Monsanto is charged occurred prior to that date.

[2] We note that the restraining order does not apply to the $35,000 in cash, and that Judge Ward found that the restraining order rendered Monsanto indigent and therefore eligible for appointed counsel. We cannot determine on this record whether Monsanto actually has $35,000 at his disposal, or what impact that might have upon his ability to retain private counsel.

Judge Ward then stated his position that invasion of the forfeitable assets could be allowed to pay attorney's fees for Monsanto's counsel of choice, but that such exemption from forfeiture would be allowed only to the extent of the rules established by the Criminal Justice Act ("CJA"). 18 U.S.C. § 3006A (1982 and Supp. IV 1986).

On August 21, 1987, Monsanto's counsel *pro tem* filed a motion to vacate or modify the restraining order by (a) permitting Monsanto to use the restrained assets to retain private trial counsel, and (b) exempting legal fees paid to that counsel from post-trial forfeiture. Judge Ward held a hearing on this motion on August 28, 1987. The court accepted that Monsanto was rendered *de facto* indigent by the restraining order. Moreover, the court was informed by counsel *pro tem* that Monsanto had contacted several "potential trial counsel," but that none of them was willing to represent Monsanto for the CJA-level compensation that Judge Ward had suggested at the August 6, 1987 conference. Counsel *pro tem* also submitted an empirical study prepared by the Association of the Bar of the City of New York indicating that private attorney's fees in RICO and CCE cases routinely exceed CJA rates. Although Judge Ward stated that some potential trial counsel should have appeared to present a proposed fee arrangement, he did not depart from his position that he would allow only CJA-level compensation. Judge Ward entered an order denying Monsanto's motion 'without prejudice to renewal upon the submission of further factual and legal argument."

On September 4, 1987, Monsanto's counsel *pro tem* filed a notice of appeal. On September 4, 1987, Monsanto moved for an expedited appeal, which was granted. Oral argument was set for October 20, 1987. On October 13, 1987, Monsanto moved for a stay of trial pending appeal. The trial date for Monsanto and thirteen co-defendants

was originally set for November 30, 1987. On the day after oral argument, however, Judge Ward adjourned the commencement of trial until January 4, 1988.

We have jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1) (1982).

Discussion

A. ***Ripeness***

At the outset, we must determine whether this controversy is ripe for adjudication. The government argues that it is not, mainly because Monsanto has failed to make an adequate record of the effect of the forfeiture provisions on his ability to obtain counsel of choice. *See United States v. Gelb*, 826 F.2d 1175, 1176-77 (2d Cir.1987).[3] While we conclude, for reasons explained below, that this case must be remanded for further proceedings, we do not agree that Monsanto has failed adequately to demonstrate the impact of the forfeiture provisions on his ability to retain counsel.

It is true, as the government points out, that no attorney appeared at the motion hearing or thereafter to present a proposed fee arrangement to Judge Ward. Nevertheless, the district court had already held two pretrial conferences at which Monsanto's *de facto* indigence and efforts to obtain counsel were made known to the court. The court had been informed, not only by Monsanto's counsel *pro tem* but also by the AUSA, that James Merberg had made his representation of Monsanto contingent upon obtaining an

[3] *Gelb* dealt with the forfeiture provisions of 18 U.S.C. § 1963 (Supp. III 1985), which apply to RICO prosecutions. These provisions were also enacted by the CFA in 1984, and are essentially identical to the provisions of 21 U.S.C. § 853 (Supp. III 1985) which apply here. *See* S.Rep. No. 225, 98th Cong., 1st Sess. 197-98, *reprinted in* 1984 U.S.Code Cong. & Admin.News 3182, 3380-81.

agreement from the government not to seek forfeiture of attorney's fees. Then, at the motion hearing, the court was informed that none of the attorneys contacted by Monsanto was interested in representing him for the CJA-level compensation that Judge Ward was willing to allow.

For purposes of ripeness, therefore, we think it would have been a futile exercise for Monsanto to bring attorneys who were uninterested in CJA-level compensation into court simply to hear Judge Ward reiterate his position that invasion of the assets would be allowed only to pay CJA rates. *See Image Carrier Corp. v. Beame*, 567 F.2d 1197, 1201-02 (2d Cir.1977), *cert. denied*, 440 U.S. 979, 99 S.Ct. 1785, 60 L.Ed.2d 239 (1979). That no attorney made such an "appearance" arguably demonstrates the very "chill" that Monsanto claims to be the effect of the forfeiture provisions on private attorneys who would otherwise represent RICO and CCE defendants. Such an appearance by an attorney would not "significantly advance our ability to deal with the legal issues presented nor aid us in their resolution." *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 82, 98 S.Ct. 2620, 2635, 57 L.Ed.2d 595 (1978). Any further delay before appeal, furthermore, would only have caused hardships for Monsanto, since the case was already set for trial, and his trial preparation would obviously be affected by the resolution of the issues presented on appeal. We note also that Monsanto and many co-defendants are detained pending trial.

United States v. Gelb, 826 F.2d 1175 (2d Cir.1987), upon which the government heavily relies, is clearly distinguishable. In *Gelb*, the defendants failed to pursue their motion to vacate and/or modify a post-indictment restraining order in the district court, representing to the court that an impending agreement with government counsel would probably moot the issue. When the agreement fell through, defendants then appealed from the re-

straining order to this court without giving the district court any opportunity to consider or decide their motion, and moved here to stay the restraining order pending appeal and expedite the appeal. We concluded that the restraining order was appealable, but denied the motions because, in view of defendants' failure to make an appropriate record before the district court and provide that court with an opportunity to "fine tune" the restraining order to meet defendants' objections, there was little prospect of success on appeal. *Id.* at 1176-77.

Here, on the contrary, Judge Ward did rule on Monsanto's motion, and he made clear his intention to adhere to the CJA-level limit on compensation. There is thus nothing to "fine tune" here, just a clear issue to be decided. The effect of the forfeiture provisions on Monsanto's ability to retain counsel of choice is accordingly certain enough for our review at this time. *See United States v. One Parcel of Land*, 614 F.Supp. 183, 185 (D.C.Ill.1985) (where attorneys had not filed appearances and had not yet accepted any fees, issue whether attorney's fees are excluded from forfeiture under 21 U.S.C. § 881 (Supp. III 1985) was nonetheless ripe for adjudication); *United States v. Rogers*, 602 F.Supp. 1332, 1348 (D.Colo.1985) (where attorneys entered "conditional appearances" which would be revoked if attorney's fees were held forfeitable under 18 U.S.C. § 1963(a)(3) (Supp. III 1985), court proceeded to decide forfeiture issue).

Nor do we regard the language of Judge Ward's order denying the motion to vacate, that it was "without prejudice to renewal upon the submission of further legal and factual argument," as precluding [review] at this time. Any application is subject to such renewal as a litigation progresses, but that does not detract from the fact that an order has been entered refusing to dissolve or modify an

injunction within the meaning of 28 U.S.C. § 1292(a)(1) (1982). *Contrast City of Fort Lauderdale v. Freeman*, 197 F.2d 122, 124 (5th Cir.1952) (appeal dismissed where no ruling made on motion to dissolve injunction, hearing of which was deferred).

B. ***Statutory Claim***

Monsanto's first contention is that we need not even address the constitutionality of the forfeiture provisions because Congress never intended the provisions to apply to property used to pay legitimate attorney's fees. Several courts have reached this conclusion.[4] *See, e.g, United States v. Estevez,* 645 F.Supp. 869 (E.D. Wis.1986); *United States v. Ianniello*, 644 F.Supp. 452 (S.D.N.Y.1985); *United States v. Rogers*, 602 F.Supp. 1332 (D.Colo.1985). *Compare United States v. Badalamenti*, 614 F.Supp. 194, 198 (S.D.N.Y.1985) (finding that Congress did not intend post-conviction forfeiture of fees already paid to an attorney, but indicating that pretrial restraint of assets that would otherwise be used to retain private counsel is a "different problem[]").

It is clear that Congress, in enacting the CFA, intended to close a loophole in the previous criminal forfeiture scheme that had allowed defendants to evade forfeiture by means of third party transfers prior to conviction. *See* S.Rep. No. 225, 98th Cong. 1st Sess. 196, *reprinted in* 1984 U.S. Code Cong. & Admin.News 3182, 3379 (hereinafter "Senate Report"). The courts that have found no

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[4] Many of the cases addressing the statutory and/or constitutional issues have done so in the context of challenges to forfeiture under 18 U.S.C. § 1963 (Supp. III 1985), the criminal forfeiture provision of RICO. These authorities are equally pertinent here, since the RICO and CCE forfeiture provisions are virtually identical. *See supra* note 3.

Congressional intent to cover legitimate attorney's fees have essentially concluded that Congress only intended the CFA to reach *fraudulent* third party transfers, such as "sham" attorney's fees. *See United States v. Harvey*, 814 F.2d 905, 913-16 (4th Cir.1987) (surveying the cases but rejecting their position), *reh'g in banc granted sub nom. United States v. Caplin & Drysdale, Chartered[,]* June 11, 1987 (hereinafter "*Harvey*"). We agree, however, with *Harvey*, the only other circuit court case that has addressed this issue directly, that the cases finding Congressional exemption of non-fraudulent attorney's fees err in their statutory interpretation.

First, the plain language of the statute is categorical and contains no exception for attorney's fees: "Any person convicted of a violation . . . shall forfeit to the United States . . . (1) *any property* constituting, or derived from, any proceeds the person obtained, directly or indirectly, as a result of such violation. . . ." 21 U.S.C. § 853(a) (Supp. III 1985) (emphasis added.). The Act allows only one exception to forfeiture of property transferred to a third person, and that exception does not mention fraud at all:

> Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferree establishes in a hearing pursuant to subsection (n) of this section that he is a *bona fide purchaser* for value of such property who at the time of purchase was *reasonably without cause to believe that the property was subject to forfeiture* under this section.

21 U.S.C. § 853(c) (Supp. III 1985) (emphasis added).

As the Fourth Circuit observed in *Harvey*, the common law meaning of "bona fide purchaser" is simply "without

notice," and an attorney may have notice that property is subject to forfeiture even though his receipt of such property in exchange for legitimate and necessary legal defense services is not fraudulent or less than an arm's length transaction. *See Harvey*, 814 F.2d at 917. *But cf. United States v. Thier*, 809 F.2d 249 (5th Cir.1987) (court does not suggest that payment of fees to counsel will always immunize fees from post-trial forfeiture, but only that a defense attorney's knowledge of the charges against client does not *ipso facto* disqualify attorney's claim to be bona fide purchaser).

Second, since the legislative history to which Monsanto and several courts point is inconclusive and does not clearly express a legislative intent that is contrary to the plain meaning of the statutory language, that meaning must prevail. *See United States v. Turkette*, 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246 (1981) (where statutory language unambiguous, that language must ordinarily be regarded as conclusive, in absence of clearly expressed legislative intent to contrary) (partially quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S. Ct. 2051, 2056, 64 L.Ed.2d 766 (1980). *See also Russello v. United States*, 464 U.S. 16, 20, 104 S.Ct. 296, 298-99, 78 L.Ed.2d 17 (1983) (quoting *Turkette*).

Three passages in the legislative history have been most relied upon by the courts that have construed the statute to exempt legitimate attorney's fees from forfeiture. The first is a footnote in a House report accompanying an early draft of the 1984 CCE forfeiture amendments: "[n]othing in this section is intended to interfere with a person's Sixth Amendment right to counsel." H.R.Rep. No. 845, Part 1, 98th Cong., 2d Sess. 19 n.1 (1984). As the court in *Harvey* concluded, this footnote is somewhat cryptic and could mean any of a number of things, none of which amounts

to a clearly expressed Congressional intention that attorney's fees should only be forfeitable when based upon sham or fraudulent transactions. *See Harvey*, 814 F.2d at 918. Furthermore, the very next sentence of that report belies any intention to establish a statutory rule concerning forfeiture of attorney's fees: "The Committee, therefore, does not resolve the conflict in District Court opinions on the use of restraining orders that impinge on a person's right to retain counsel in a criminal case." H.R. Rep. No. 845, *loc. cit.*

The second passage, also a footnote, appears in an analysis by the Senate Judiciary Committee of the *bona fide* purchaser exception in the CFA: "[t]he provision is to be construed to deny relief to third parties acting as nominees of the defendant or who have knowingly engaged in sham or fraudulent transactions." Senate Report 209 n. 47, 1984 U.S.Code Cong. & Admin. News 3392 n. 47. Again, we agree with *Harvey* that this statement does not state or imply that *only* nominee, sham or fraudulent transactions may lead to third party forfeiture, in contravention of the plain meaning of the statute. *See Harvey*, 814 F.2d at 916-17. Indeed, one court went so far as to interpolate the word "only" (bracketed, to be sure) into its quotation of this legislative history in support of its conclusion that only sham attorney's fees were subject to forfeiture. *See United States v. Rogers*, 602 F.Supp. 1332, 1347 (D.Colo.1985). We agree that the addition is required to sustain the position; we do not agree that :he addition is appropriate.

The third passage comes from the same Senate report: "[t]he purpose of this provision is to permit the voiding of certain pre-conviction transfers and so close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were *not 'arm's length' transactions.*" Senate Report 200-01, 1984

U.S.Code Cong. & Admin. News 3383, 3384 (emphasis added). The very next sentence of the report states, however: "[o]n the other hand, this provision should not operate to the detriment of innocent *bona fide* purchasers of the defendant's property." *Id.* at 201, 1984 U.S. Code Cong. & Admin.News 3384. Read as whole, this passages establishes with clarity only that "*bona fide* purchasers" in the normal sense, *i.e.*, those who have no notice of the property's taint, will not be subject to the forfeiture penalty. There is certainly no clear expression of an intention to exempt from forfeiture fees paid to attorneys who are on notice, solely because those payments constitute legitimate fees for actual services rendered.

In sum, the evidence of contrary legislative intent, viewed both singly and in combination, is thoroughly ambiguous, and is certainly not clear enough to warrant departure from the plain meaning of the statute. The courts that have read the "bona fide purchaser" exemption to include legitimate attorney's fees have typically done so in order to avoid confronting the sixth amendment question which results from a contrary interpretation. *See, e.g., United States v. Estevez*, 645 F.Sup. 869, 870-71 (E.D.Wis. 1986); *United States v. Ianniello*, 644 F.Supp. 452, 456 (S.D.N.Y.1985); *United States v. Badalamenti*, 614 F.Supp. 194, 196 (S.D.N.Y.1985); *United States v. Rogers*, 602 F.Supp. 1332, 1339 (D.Colo.1985). This course is only appropriate, however, where a statute is fairly susceptible to more than one interpretation, in which event the interpretation most consistent with constitutionality should be adopted. *See United States v. Rumely*, 345 U.S. 41, 45, 73 S.Ct. 543, 545-46, 97 L.Ed. 770 (1953). We agree with *Harvey*, 814 F.2d at 917-18, that we are not presented with "fair alternatives" of construction here, and accordingly conclude that the

"bona fide purchaser" exemption of 21 U.S.C. § 853(c) (Supp. III 1985) does not exempt legitimate, non-fraudulent attorney's fees from forfeiture.

C. Constitutional Claim

It is clear that the sixth amendment right to counsel includes a right to privately retained counsel of choice. *See, e.g., United States v. Curcio*, 694 F.2d 14, 22-23 (2d Cir.1982). "An accused who is financially able to retain counsel must not be deprived of the opportunity to do so." *United States v. Burton*, 584 F.2d 485, 489 (D.C.Cir.1978), *cert. denied*, 439 U.S. 1069, 99 S.Ct. 837, 59 L.Ed.2d 34 (1979). It is equally clear, however, that the right to counsel of choice is qualified, and can be outweighed by countervailing governmental interests. *See, e.g, United States v. Paone*, 782 F.2d 386, 392 (2d Cir.), *cert. denied*, ____ U.S. ____, 107 S.Ct. 269, 93 L.Ed.2d 246 (1986); *In Re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238, 250-51 (2d Cir.1985) (in banc), *cert. denied*, 475 U.S. 1108, 106 S.Ct. 1515, 89 L.Ed.2d 914 (1986). The two courts that have directly addressed the issue of the constitutional right to counsel of choice in the context of the CFA have found that the government's interest in forfeiture is outweighed by the defendant's interest in using his property to retain counsel *Harvey*, 814 F.2d at 924; *United States v. Nichols*, 654 F.Supp. 1541, 1558 (D.Utah 1987). We disagree with the reasoning and the results of those cases.

First, we think that both *Harvey* and *Nichols* undervalue the government's interest in restraining and obtaining forfeiture of assets that would otherwise be used to compensate private counsel of choice. The general governmental interest in forfeiture is to "strip [racketeering and drug trafficking] offenders and organizations of their

economic power." Senate Report 191, 1984 U.S.Code Cong. & Admin. News 3374. The specific interest embodied in the post-indictment restraint and "relation-back" provisions is to prevent defendants from "defeating forfeiture by removing, transferring, or concealing their assets prior to conviction." *Id.* at 195, 1984 U.S.Code Cong. & Admin.News 3378. The court in *Harvey* conceded the importance of these interests, but found them only to outweigh "any 'right' by an accused to transfer tainted property to this defense counsel, ostensibly as attorney fees but in reality as a sham to prevent forfeiture." *Harvey*, 814 F.2d at 924. The court in *Nichols* flatly concluded that "[e]xempting attorneys' fees from a preconviction restraining order . . . does not undermine the statute's purpose of stripping drug dealers of their economic bases." *United States v. Nichols*, 654 F.Supp. at 1558. *See also United States v. Thier*, 801 F.2d 1463, 1474-75 (5th Cir.1986) (exempting from restraint sufficient assets to pay reasonable attorneys fees and necessary living expenses does not allow defendant to benefit economically from crime), *modified*, 809 F.2d 249 (1987).

This approach, we think, amounts to an impermissible substitution of judicial policy for Congressional policy. Because of the protracted and complicated nature of RICO and CCE prosecutions, very considerable amounts of money may be paid to defense counsel. If, as we have concluded, Congress did not see fit to exempt tainted assets from forfeiture for the payment of legal expenses, we are reluctant to conclude that such transfers do not significantly impede the statutory purpose. Furthermore, it seems anomalous to contend that privately retained counsel is essential to the effective defense of RICO and CCE prosecutions, as those who favor exemption of attorney's fees from forfeiture invariably maintain,[5] while

[5] *E.g.*, Brief of The Association of the Bar of The City of New York, Committee on Criminal Advocacy, as *Amicus Curiae* in sup-

arguing that a defendant who is enabled to retain private counsel solely because he possessed tainted funds as a result of criminal activity does not benefit from his possession of those funds. *See In re Grand Jury Subpoena Duces Tecum dated January 2, 1985 (Payden),* 605 F.Supp. 839, 849 n. 14 (S.D.N.Y.), *rev'd on other grounds*, 767 F.2d 26 (2d Cir.1985). Clearly, he would thus attain a benefit not available to indigent defendants who do not have tainted funds at their disposal.

More importantly, we also conclude that *Harvey* and *Nichols* overvalue the legitimacy of a defendant's interest in using possibly tainted assets. Specifically, we are not convinced by the *Harvey* court's attempt to distinguish forfeiture and restraint of assets under the CFA from the situation in which a criminal defendant would simply be prevented from using derivative contraband, such as money seized immediately after a drug sale or a bank robbery, to retain counsel. *Harvey* distinguished such situations in these terms:

> In such cases, the government seized property manifestly that of someone other than the accused and for preservative purposes. Forfeiture under the Act [, on the other hand,] may obviously reach property to which no third party has a superior claim. The financial plight that might result from sequestration of contraband is simply of a piece with that resulting from other vagaries of life that make it impossible to hire private counsel.

Harvey, 814 F.2d at 926.

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port of Defendant-Appellant at 13-14. *See also United States v. Rogers*, 602 F.Supp. 1332, 1349-50 (D.Colo.1985) (given the exigencies of RICO cases, court appointed counsel is inadequate substitute for privately retained counsel).

Even though property subject to forfeiture under the CFA may not be "that of someone other than the accused," the *Harvey* rationale overlooks the fact that "[a]ll right, title, and interest in [forfeitable] property described in subsection (a) of this section *vests in the United States upon the commission of the act giving rise to forfeiture under this section.*" 21 U.S.C. § 853(c) (Supp. III 1985) (emphasis added). *See United States v. Ginsburg*, 773 F.2d 798, 801 (7th Cir.1985) (while government's interest in profits or proceeds of racketeering activity does not *attach* until conviction, its interest *vests* at the time of the act that constitutes the racketeering violation), *cert. denied*, 475 U.S. 1011, 106 S.Ct. 1186, 89 L.Ed.2d 302 (1986).

The real distinction, it seems to us, is the degree of likelihood that the property is subject to the superior claim of a third party (the bank or its depositor, in the case of a bank robbery; the government, in the case of forfeitable assets). *See Harvey*, 814 F.2d at 926 (sequestered contraband "manifestly" property of someone other than the accused). In the case of the bank robber arrested with loot in his hands or the drug dealer arrested with money from a sell in his hands, it is manifest that the property is probable contraband and thus forfeitable. The question is whether restraint and forfeiture under the CFA is more analogous to the situation in which obvious contraband is seized than to the situation in which property is seized even though there is no suggestion that it is related to any criminal activity. *See United States ex rel. Ferenc v. Brierley*, 320 F.Supp. 406 (E.D.Pa.1970) (right to retain private counsel violated by government's pre-trial failure to return money seized in excess of sum alleged to have been stolen). In the case before us, where the property is real estate rather than obvious contraband, the only source of certainty that the property is probably the pro-

ceeds of criminal activity is the indictment itself. *But see United States v. Long*, 654 F.2d 911, 915 (3d Cir.1981) (government cannot rely on indictment alone to establish likelihood that properties are subject to forfeiture).

As disinclined as we are to establish an absolute rule exempting property earmarked for attorney's fees from forfeiture, we are equally disinclined to postulate an absolute rule allowing the government to impose indigence and deprive RICO and CCE defendants of the opportunity to retain private counsel merely by obtaining an indictment. Such a rule would give the government "the ultimate tactical advantage of being able to exclude competent counsel as it chooses" simply by "appending a charge of forfeiture to an indictment under RICO" or CCE. *United States v. Rogers*, 602 F.Supp. 1332, 1350 (D.Colo. 1985).

In our search for a reasonable compromise between the statutorily posited interests of the government and the qualified right of a defendant to retain counsel of choice, we have found an alternative rule suggested by the line of circuit court cases requiring a post-restraining order adversarial hearing with respect to forfeiture-related restraining orders.[6] *See Harvey*, 814 F.2d at 928-29; *United States v. Thier*, 801 F.2d 1463, 1466-70 (5th Cir.1936), *modified*, 809 F.2d 249 (5th Cir.1987); *United States v. Crozier*, 777

[6] Monsanto's attorney *pro tem* argued for such a hearing below as a "possible solution," but Judge Ward denied the request and the issue was not pursued on appeal. We note that this situation meets the concern expressed in our colleague's dissent as to who would represent a defendant at such a hearing in *this* case, and suggest further that as a general rule, prospective counsel unwilling to represent a defendant at an extended trial because unable to be paid from forfeitable assets would nonetheless be willing to represent him at a relatively brief pretrial hearing to make those assets available to compensate the attorney for trial representation.

F.2d 1376, 1382-84 (9th Cir.1985);[7] *United States v. Lewis*, 759 F.2d 1316, 1324-25 (8th Cir.), *cert. denied*, 474 U.S. 994, 106 S.Ct. 406, 407, 88 L.Ed.2d 357 (1985); *United States v. Spilotro*, 680 F.2d 612, 616-19 (9th Cir.1982); *United States v. Long*, 654 F.2d 911, 915-16 (3d Cir.1981). *But see United States v. Musson*, 802 F.2d 384 (10th Cir.1986); *United States v. Draine*, 637 F.Supp. 482, 485-86 (S.D.Ala.1986); Senate Report 195-96. Where such a hearing is afforded, as we agree it must be, and the restraining order is thereafter continued, we conclude that

[7] An earlier decision in *Crozier*, 674 F.2d 1293 (9th Cir.1982), was vacated and remanded by the Supreme Court, 468 U.S. 1206 (1984), for further consideration in light of, *inter alia, United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency*, 461 U.S. 555, 103 S.Ct. 2005, 76 L.Ed.2d 143 (1983). In the latter case, the Supreme Court approved, under the circumstances there presented and as against a claim that procedural due process had been violated, an eighteen month delay from the seizure of the $8,850 by an inspecting Customs Service officer to the initiation by the United States of a civil action for the forfeiture of the money. Upon remand in *Crozier*, the Ninth Circuit distinguished criminal forfeiture under the CFA from civil forfeiture under the customs laws, and adhered to its prior ruling, 674 F.2d at 1297-98, that due process requires a pre-trial adversary hearing for the continuance of a restraining order based upon forfeiture counts in an indictment. 777 F.2d at 1382-84.

To avoid any doubt concerning our holding, we rule that a pre-trial adversary hearing is required where the question of attorney's fees is implicated, whether or not the law is ultimately settled that such a hearing is required with respect to any and all restraining orders based upon forfeiture counts in a criminal indictment. In other words, in view of the special sixth amendment considerations presented where a forfeiture impacts adversely upon the retention of counsel of choice, an ultimate overruling of the line of authority cited above, of which *Crozier* is representative, would not affect our holding herein unless that ruling specifically encompassed the situation where a restraining order is challenged as violative of the limited sixth amendment right to counsel of choice.

there is no sixth amendment requirement that the restrained property be made available for attorney's fees.

Courts that have required post-restraining order hearings have done so in the context of procedural due process challenges to the freezing of a defendant's property prior to trial. *See, e.g., Harvey*, 814 F.2d at 929-29. *Harvey* concluded: "No reason appears why the government would be unduly burdened or any public interest disserved by providing the same sort of immediate post-deprivation hearing in the post-indictment setting as is required in the pre-indictment setting by [21 U.S.C.] § 853 or as is contemplated by Fed.R.Civ.P. 65." Some courts have held that such hearings are consistent with the restraining order provision, 21 U.S.C. § 853(e)(1)(A) (Supp. III 1985), because "[t]he requirements of Rule 65 apply to the issuance of all restraining orders and injunctions by the courts of the United States." *United States v. Thier*, 801 F.2d at 1468. Other courts have superimposed the requirement of an adversary hearing upon section 853(e)(1)(A) because "to the extent the Act authorizes the issuance of *ex parte* restraining orders after indictment without any post-deprivation hearing other than a criminal trial, it violates fifth amendment due process guarantees." *Harvey*, 814 F.2d at 929. Since section 853 of the statute very specifically requires notice and a hearing for pre-indictment restraining orders, 21 U.S.C. § 853(e)(1)(B) (Supp. III 1985), but omits that requirement for post-indictment orders, 21 U.S.C. § 853(e)(1)(A) (Supp. III 1985), we conclude with *Harvey* that notice and a hearing are constitutionally required (*i.e.*, as a matter of fifth amendment due process)[8] with respect to post-indictment restraining orders, but are not statutorily required.

[8] *But see* note 7, *supra*.

Courts have also differed with regard to the government's burden at such hearings. Several pre-1984 amendment cases required the government to demonstrate, by evidence independent of the indictment, a probability of convincing a jury beyond a reasonable doubt both that the defendant has violated the statute and that the assets are subject to forfeiture, and we concur in that view. *See United States v. Lewis*, 759 F.2d at 1324; *United States v. Spilotro*, 680 F.2d at 618; *United States v. Long*, 654 F.2d at 915. On the other hand, *United States v. Thier*, relying on the legislative history of the 1984 CFA, concluded that the indictment itself constitutes a "strong showing" for continuing the freeze order, although "the grand jury's finding of probable cause that the defendant should be tried for the crime and its determination that certain assets are potentially forfeitable . . . are not irrebutable." 801 F.2d at 1470. *See* Senate Report 203 (at hearing to modify or vacate post-indictment restraining order, court is not to entertain challenges to validity of indictment). The courts seem to agree that the district court must at least consider the strength of the government's independent evidence and must determine that the government has a likelihood of succeeding at trial. Such a requirement, anomalous as it may seem in a criminal context, is not totally foreign. *Compare* 21 U.S.C. § 853(e)(1)(B)(ii) (Supp. III 1985) (in ruling on an application for a *pre*-indictment restraining order, court must determine that there is substantial probability that United States will prevail on the issue of forfeitability).[9]

[9] Some courts, in requiring an adversary hearing in the forfeiture context, have suggested that the traditional standards for granting a preliminary injunction are incorporated into such hearings. *See United States v. Thier*, 801 F.2d at 1470; *United States v. Spilotro*,

Requiring an adversarial hearing, at which the government has the burden to demonstrate the likelihood that the assets are forfeitable, will provide a procedural check against the government's discretion to limit CCE and RICO defendants' choice of counsel simply by obtaining a forfeiture charge in the indictment. If the government cannot demonstrate the likelihood that a jury would find the assets to be the proceeds of crime, the interest of the defendant in using the property to retain counsel of choice should prevail. *Cf.* Brickey, *Forfeiture of Attorneys' Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel*, 72 Va.L.Rev. 493, 524-25 (1986) (where government's forfeiture allegations unfounded, case is similar to that where government refuses to return untainted assets).

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680 F.2d at 618. This court requires that the applicant for a preliminary injunction establish:

> (1) irreparable harm and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidely in its favor.

Baker's Aid v. Hussman Foodservice Co., 803 F.2d 13, 15 (2d Cir.1987), and cases there cited. Because we hold, *infra*, that once the government fails to obtain pre-trial restraint of assets needed for attorney's fees it also loses the right to seek post-trial forfeiture of property transferred to counsel for legitimate defense services, we conclude that the element of irreparable injury will always be present in such cases. The element of likelihood of success on the merits will be addressed, of course, by inquiry into the likelihood that the government will convince a jury that the defendant is guilty and the disputed assets are subject to forfeiture. Since we rule that due process requires a showing of "likelihood of success," we do not consider that the alternative of establishing "sufficiently serious questions going to the merits" should be available to the government. In view of the foregoing, we also will not require the kind of "harm balancing" that is involved when the applicant for an injuntion can only establish "sufficiently serious questions going to the merits" rather than likelihood of success.

In the event the district court finds that the government has not met its burden and lifts the restraining order, moreover, we think the district court should also order that any funds thereafter used to pay legitimate attorney's fees be exempt from any future post-trial forfeiture. We recognize that this may result in a situation in which the government does not meet its burden at the pre-trial hearing, but obtains a favorable verdict of forfeiture at trial the execution of which is hindered or totally precluded by the pre-trial ruling. Nevertheless, we are persuaded, as was the court in *Harvey*, 814 F.2d at 926, that not only the pre-trial "freeze" orders, but also the *threat* of post-conviction third party forfeiture, may effectively prevent a defendant from being able to retain counsel of choice. At the pre-trial stage, where the defendant is presumed innocent, we hold that if the government cannot make a sufficient showing to justify a restraining order, the defendant should not have to bear the risk that private counsel will still be deterred by the prospect of disgorging attorneys' fees after trial.[10] To the extent that some funds ultimately

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[10] This should deal with the problem suggested in *United States v. Badalamenti*, 614 F.Supp. 194, 197 (S.D.N.Y.1985). The court there envisioned a situation in which a wealthy defendant could not qualify as indigent and obtain appointed counsel, but would be unable to retain private counsel because of the threat of post-trial forfeiture of attorney's fees. We are not faced with such a possibility here, since the district court has found that enforcement of the restraining order will render Monsanto indigent and thus qualified for appointed counsel. Similarly, and importantly, the prohibition of post-trial fee recapture under these circumstances should obviate the "conflict of interest" concern expressed in the cases and literature on this subject, *see, e.g.*, *United States v. Ianniello*, 644 F.Supp. 452, 457 (S.D.N.Y.1985), with respect to an attorney's simultaneous and potentially conflicting concerns to represent his client diligently while avoiding post-trial forfeiture of his fees. We suggest that for that reason, the quotation

found to be forfeitable at trial will remain in the hands of attorneys, we view this as a necessary cost in this difficult balance between the interests of the government and the defendant's sixth amendment right to counsel of choice.

On the other hand, if the government meets its burden at the hearing, we conclude that the defendant has no sixth amendment right to exemption of assets earmarked for attorney fees either from pre-trial restraint or from post-conviction forfeiture. Once the government has established a likelihood that the assets are indeed forfeitable, the case is more analogous to the situation in which a defendant is denied access to contraband that is manifestly subject to the interest of someone other than the accused. The right to retain private counsel of choice is not absolute; and, in the event that the defendant does not prevail at a post-restraint hearing, he is still guaranteed appointed counsel under the sixth amendment. We see no constitutional principle requiring that a defendant whose ability to pay private counsel results solely from the possession of property which he has acquired by criminal activity, which property Congress has declared to be forfeitable, must be placed in a position preferable to that of an indigent defendant who does not have such property at his disposal.

We also approve Judge Ward's suggestion that forfeitable assets may be invaded for the purpose of paying attorney's fees at CJA rates to any private attorney of the defendant's choice who would be willing to represent him for such compensation. As the government conceded at oral argument, the government would have to pay CJA rates anyway (to appointed counsel), and it makes little

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from *United States v. Badalamenti*, 614 F.Supp. 194, 196-97 (S.D.N.Y.1985), in our colleague's dissent is inapposite to the rule stated herein.

practical difference whether the payment comes from assets forfeitable to the government or from another government source. Furthermore, this rule would enable a criminal defendant to retain counsel of choice (assuming counsel's willingness to accept CJA rates), thus minimizing the incursion upon the defendant's limited constitutional right to counsel of choice.

We accordingly remand to the district court to conduct a hearing at which the government will have the burden of establishing the probability that Monsanto will be convicted at trial and the residential properties in question will be subject to forfeiture. The procedures generally followed at Fed.R.Civ.P. 65 hearings should apply. In view of 21 U.S.C. § 853(e)(3) (Supp. III 1985), however, the district court will not be bound by the Fe Rules of Evidence at the hearing. *See United States v. Rogers*, 602 F.Supp. 1332, 1345 (D.Colo.1985). Nor will the "balancing" tests traditionally utilized in Rule 65 hearings be applicable, *see* note 9 *supra*; only the government's likelihood of success in convicting the defendant and obtaining forfeiture of the disputed assets will be at issue. In the event the government meets its burden at the hearing and the restraining order is continued, no exemption from the provisions of the restraining order will be made to enable Monsanto to retain private counsel of choice, except to the extent of allowing the payment of attorney's fees at CJA rates from the restrained assets.

Inasmuch as the district court has adjourned the commencement of trial until January 4, 1988, we deny Monsanto's motion for stay of trial pending appeal as moot. We would assume, in any event, that the experienced and capable district judge before whom this litigation is pending would manage his calendar so as to meet any legitimate scheduling concerns resulting from this appeal.

Conclusion

We reverse and remand to the district court for further proceedings not inconsistent with this opinion. The mandate shall issue forthwith.

OAKES, Circuit Judge, dissenting:

I agree that the case is ripe and appealable. I agree also that the district court cases holding that Congress did not intend the forfeiture provisions of RICO and CCE to apply to legitimate counsel fees, *e.g., United States v. Estevez*, 645 F.Supp. 869, 871-72 (E.D.Wis.1986), were erroneously decided. Reading the "bona fide" purchaser provision, 18 U.S.C. § 1963(*l*)(6)(B) (Supp. IV 1986), to cover attorneys who have reasonable cause to believe their fees might be payable out of property subject to forfeiture improperly contorts the plain language of the statute. *See United States v. Harvey*, 814 F.2d 905, 913-16 (4th Cir.1987), *reh'g en banc granted sub nom. United States v. Caplin & Drysdale, Chartered* (June 11, 1987). After all, as Judge Leval noted, "[n]o one is more on notice of likelihood that the money may come from . . . prohibited activity than the lawyer who is asked to represent the defendant in the trial of the indictment." *United States v. Badalamenti*, 614 F.Supp. 194, 196 (S.D.N.Y.1985).

However, the majority opinion's characterization of the right to counsel as merely "a defendant's interest in using possibly tainted assets" permits deference to congressional policy in the face of conflicting constitutional rights. The Sixth Amendment is implicated not only on the individual level of the particular defendant, but also on the institutional level of the criminal justice system as a whole.[1] *See*

[1] Although this court wherever possible must construe statutes to avoid unconstitutional results, *Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598 (1932), here neither the legislative history nor the plain language of the statute supports an exemption for attorneys' fees from forfeiture. Therefore, the Sixth and Fifth Amendment concerns cannot be ignored. *See Harvey*, 814 F.2d at 917-18.

Cloud, *Forfeiting Defense Attorneys' Fees: Applying an Institutional Role Theory to Define Individual Constitutional Rights,* 1987 Wis.L.Rev. 1, 8-15; Note, *Against Forfeiture of Attorneys' Fees Under RICO: Protecting the Constitutional Rights of Criminal Defendants,* 61 N.Y.U. L.Rev. 124, 146-48 (1986). Therefore, I agree with the result in *Harvey*, 814 F.2d at 924-26,[2] and would not limit the analysis, as does the majority, to weighing the Government's interest in forfeiture against the defendant's interest in using his property to employ counsel of his choice. Rather, I would also consider the systemic interest of permitting defense counsel to perform their proper role in our adversary system of justice. As the Supreme Court said in *United States v. Cronic*, 466 U.S. 648, 655, 104 S.Ct. 2039, 2044-45, 80 L.Ed.2d 657 (1984) (quoting *Herring v. New York*, 422 U.S. 853, 862, 95 S.Ct. 2550, 2555, 45 L.Ed.2d 593 (1975)), "[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *See also Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 2063-64, 80 L.Ed.2d 674 (1984); *Polk County v. Dodson*, 454 U.S. 312, 318-19, 102 S.Ct. 445, 449-50, 70 L.Ed.2d 509 (1981). The process itself is worthy of protection.

By failing to credit the institutional interests in a fair adversarial system, the majority opinion provides the Government with a negative, indeed an unwholesome, power over the defendant's choice of counsel in the very

[2] *Harvey*, of course, held that the Act could properly reach fraudulent or sham transfers to an attorney, 814 F.2d at 924, 929, and I agree with that also.

type of complex criminal case where astute, experienced counsel is most needed. RICO and CCE cases involve vague statutes and severe penalties. If a conspiracy charge was, in Learned Hand's words, the "darling of the modern prosecutor's nursery," *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir.1925), what would he say of a RICO charge whose three or four conspiracies are charged as the "predicate" acts? *E.g., United States v. Ruggiero*, 726 F.2d 913, 918-19 (2d Cir.), *cert. denied*, 469 U.S. 831, 105 S.Ct. 118, 83 L.Ed.2d 60 (1984). Can we seriously contend that a proper balance would be effected in such cases by giving a defendant, made "indigent" by the Government's assertion of a potential forfeiture claim, a young attorney from an underfunded, overworked public defender's office for the ensuing 6-15 month trial? *See* Cloud,, 1987 Wis.L.Rev. at 47-48 & n. 224. Or a lawyer appointed under the Criminal Justice Act, with its limitations on fees for attorneys, 18 U.S.C. § 3006A(d)(1) (1982 & Supp. IV 1986), and investigative or expert services? 18 U.S.C. § 3006A(e) (1982 & Supp. IV 1986). *See United States v. Reckmeyer*, 631 F.Supp. 1191, 1197 (E.D.Va.1986), *aff'd sub nom. Harvey*, 814 F.2d 905.

While Congress may wish to consider the pre-trial mini-trial that the majority opinion proposes in any attempt to revise the statute to meet the constitutional demands, the proposal is problematic. First, I am curious as to who will represent the defendant at this hearing. Second, in theory the Government's burden of showing likelihood of success on the merits of the criminal charges and on the issue of forfeitability of the assets is substantial. But, as a practical matter, absent rigorous cross-examination or the production of evidence to show that the defendant's property was earned or derived from legitimate sources, the Government will have little trouble meeting *that* burden. Thus, the mini-trial would do little to protect the interests of

either the defendant or the adversarial system. Finally, we should be hesitant to create this new procedural step in light of the Supreme Court's firm rejection of the new universe of mini-trials in respect to class actions. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-178, 94 S.Ct. 2140, 2152-53, 40 L.Ed.2d 732 (1974).

The forfeiture statute, which permits the Government to recapture attorneys' fees paid before conviction, is unconstitutional at least on Sixth Amendment, and possibly on Fifth Amendment due process, grounds. *See United States v. Thier*, 801 F.2d 1463, 1475-77 (5th Cir.1986) (Rubin, J., concurring); Cloud, 1987 Wis.L.Rev. at 50 n. 237. *See also United States v. Bassett*, 632 F.Supp. 1308, 1316 (D.Md.1986) ("Although the 'relation back' aspect of the forfeiture statute is only triggered by conviction, the practical effect is that if forfeiture is applied to attorneys' fees the true impact is felt *prior* to conviction."), *aff'd sub nom. Harvey*, 814 F.2d 905. Judge Leval put it even better in *Badalamenti*:

> A lawyer who was so foolish, ignorant, beholden or idealistic as to take the business would find himself in inevitable positions of conflict. His obligation to be well informed on the subject of this client's case would conflict with his interest in not learning facts that would endanger his fee by telling him his fee was the proceeds of illegal activity. If he made efforts to fight the forfeiture claiming he was "reasonably without cause to believe that the property was subject to forfeiture," the evidence on this issue would consist primarily of privileged matter confided to him by his client. He might furthermore be found to have accepted a contingent fee in a criminal case in violation of DR 2-106(C), since his retention of his fee would

depend on gaining an acquittal in the client's trial. The statute would give attorneys a motive to negotiate a guilty plea that did not involve forfeiture, rather than fight the case expending valuable time and increasing the risk of incurring forfeiture.

614 F.Supp. at 196-97.

Surely this statute not only intrudes upon the individual's right to secure counsel of his choice. It shakes the very foundations of our criminal justice system.

Accordingly I dissent.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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87 Cr. Misc. #1 pg. 25

UNITED STATES OF AMERICA

v.

PETER MONSANTO, ET AL., DEFENDANTS

[Filed July 9, 1987]

POST-INDICTMENT RESTRAINING ORDER PURSUANT TO 21 U.S.C. § 853(e)(1)(A)

WHEREAS, on June 23, 1987, the defendant PETER MONSANTO was indicted on charges including violations of Title 21, United States Code, §§ 841 and 846 under the Controlled Substances Act of 1970, as amended; and

WHEREAS, the Indictment charges that the property enumerated below is all subject to forfeiture pursuant to 21 U.S.C. § 853; and

WHEREAS, pursuant to 21 U.S.C. § 853(e)(1)(A) the Court may enter a restraining order to preserve the availability of property that is subject to forfeiture "upon the filing of an indictment or information charging a violation of [the Controlled Substances Act] . . . and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture . . ."; and

WHEREAS, in the event of the conviction of PETER MONSANTO, the property enumerated below will be subject to forfeiture;

NOW, upon the application of Rudolph W. Giuliani, United States Attorney for the Southern District of New York, it is hereby

ORDERED that defendant PETER MONSANTO and his attorneys, agents and employees, and all persons in active concert or participation with any of the above shall not, directly or indirectly transfer, sell, assign, pledge, encumber or dispose of in any manner; cause to be transferred, sold, assigned, pledged, encumbered or disposed of in any manner; or take, or cause to be taken, any action that would have the effect of depreciating, damaging, or in any way diminishing the value of the following property or interests:

(1) a residence at 85 Delray Drive, Mt. Vernon, New York.
(2) a residence at 3240 Riverdale Avenue, Apartment 6E, Bronx, New York

IT IS FURTHER ORDERED that this restraining order shall be binding upon the defendants, their attorneys, agents and employees, and all persons in active concert or participation with any of the above who receive actual notice of this order.

Dated: New York, New York
July 8, 1987

SO ORDERED:

/s/ JOHN F. KEENAN
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

87 Cr. 555

UNITED STATES OF AMERICA

v.

PETER MONSANTO, ET AL., DEFENDANTS

10:00 a.m.

Before: HON. ROBERT J. WARD, District Judge

August 28, 1987

Inasmuch as the Court is not prepared to find the forfeiture provision of the statute unconstitutional and the intention of Congress in enacting the statute appears clear, the within motion for an order, pursuant to 21 U.S.C. § 853, vacating the Post-Indictment restraining order dated July 8, 1987 to the extent of permitting defendant Peter Monsanto to expend a portion of the restrained funds to retain private counsel and to exempt such legal fees from post-trial forfeiture is denied without prejudice to renewal upon the submission of further factual and legal argument.

It is so ordered.

/s/ ROBERT J. WARD
U.S.D.J.

APPENDIX E

EXCERPTS OF THE TRANSCRIPT OF THE HEARING ON REMAND FROM THE COURT OF APPEALS' PANEL DECISION THAT CONTAIN THE DISTRICT COURT'S FACTUAL FINDINGS AND LEGAL RULINGS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S87 Cr. 555 RJW

UNITED STATES OF AMERICA

v.

PETER MONSANTO, DEFENDANT

January 15, 1988

MR. CHIKOFSKY [Counsel for petitioner]: I only wish to make a proffer and I would like to make that proffer by Wednesday, and Mr. Hansen may have whatever time is appropriate for him. Whatever time your Honor sets, we can having closing arguments on this matter.

For the purpose of jury selection next week, insofar as for the limited purpose of jury selection, Mr. Monsanto will consent to have Mr. Fogelson act as his attorney for that purpose without, of course, waiving his right, as we know.

THE COURT: Perhaps the way for me to do it, because I don't believe I could "prevent" you from making a proffer, what I should do is deny the motion to vacate the restraining order without prejudice to your making any subsequent submissions, and to permit the government to respond to any subsequent submissions that you wish to make.

I do that because I feel quite sincerely that there are no submissions that you are likely to make which would likely change my mind, so I would be prepared—and I would hear from Mr. Hansen on this—to deny the motion to vacate the restraining order on the basis of the present record without prejudice to some further submission should you choose to make it, which you think would materially change matters, and then to give the government an opportunity to respond.

MR. CHIKOFSKY: If we're going to do that, I oppose that vehemently.

Once your Honor denies the motion, there is, as Justice Holmes once said, a hydraulic pressure to adhere to a decision once made without in a sense giving reconsideration to re-opening the matter.

The matter should be kept open, or else I would like a much better offer of proof from Mr. Hansen as to his demonstration as to the sources of the money, and his demonstration that those moneys were narcotics-related. I still don't think the government has met its burden on that. They have not traced money significantly to the defendant Monsanto and, more importantly, they have not traced the money to narcotics proceeds.

THE COURT: I think you ignore the totality of the material in Government Exhibits 1, 2, and 3.

My view at the moment is that the government has demonstrated that Mr. Monsanto was involved in a narcotics conspiracy and that the restrained property—and I focus for the moment on 85 Delray—was obtained with proceeds of his narcotics-related activities.

Needless to say, my determination on the restraint does not represent a finding of guilt on the criminal charges.

If I thought that the proffer you had made or any additional proffer you could make would persuade me to some

other conclusion, I would certainly permit the submission of further proof.

But, under the circumstances, I really believe it would be a fruitless gesture, and that's why the best I could propose—and we have yet to hear from Mr. Hansen—is to deny the motion to vacate the restraint without prejudice to your making some additional submission.

You say there is a hydraulic effect. I suggest I don't think there is anything you could present to me that's really doable, that's going to change matters, but I don't know. I am always willing to listen. I have listened during the course of the motion, decided some matters one way and decided other matters the other way.

Suppression, anonymous jury, everything didn't go one way, and I've done it on the basis of what I think is correct. I've done it on the basis of the overall picture presented.

I just don't see that there is anything you can come up with, for example, concerning the ticket business or Jackgirl's which is likely to change it.

I feel his business, based on the conversations on the tapes and the physical evidence found, was narcotics.

There was some comment: Where are the drugs themselves?

Believe me, if there was a seizure of drugs, it would be here in the courtroom for all to see.

On the other hand, a successful enterprise normally results in the total sale and distribution of the inventory. The guy who is unsuccessful is the guy that's stuck with a big inventory.

The bottom line is he was successful, he distributed large quantities that has long ago been shot up or smoked, and that's why it's not here. What is here is the evidence of his activities and the results which I have mentioned.

This defendant was very successful at what he did. Unfortunately, what he did was violative of federal law. That's the problem.

If he was unsuccessful, he would have been caught like the fellow this morning that some of you saw who was caught with three kilos of cocaine. He was unsuccessful. The bottom line remains the same.

MR. CHIKOFSKY: The bottom line, I must say the nature of the evidence adduced I think gives credence to what Judge Oakes said in his dissent, that these kinds of hearings where they are based entirely upon hearsay basically give a defense very little opportunity to properly cross-examine because of the fact the agent who generally testifies, who presents the case, has no direct knowledge himself, and basically it's going on hearsay and, in particular, the perfect example was the handwriting example because we had no opportunity to properly cross-examine; in fact, he could not even explain the basis for the handwriting expert's viewpoint, and when I attempted to proffer handwriting exemplars it was in effect waived away.

THE COURT: You will have an opportunity during the course of the trial—maybe not you but Mr. Fogelson, to confront and cross-examine, I assume, Mr. Lesnevich, the handwriting expert. There may be others. I don't know.

I recognize that this is an important hearing because it affects the right to counsel. At the same time, the defendant is still afforded all the safeguards under the constitution and laws of this country to a fair trial and to the right to confront and cross-examine the witnesses who testify in support of the government's charge in this case.

Mr. Hansen, is there anything you want to add? I'm prepared to deny the application made by Mr. Chikofsky for additional time to make submissions on the basis that the

proffer that has been made is not adequate to accomplish the purpose.

MR. HANSEN [attorney for the government]: We have nothing further, your Honor.

MR. CHIKOFSKY: If your Honor is denying the motion outright and denying our opportunity to provide any further documentation, obviously Mr. Monsanto is withdrawing any consent to the representation of Mr. Fogelson as counsel of choice.

THE COURT: I think that's appropriate.

MR. CHIKOFSKY: So the record is preserved for further appellate review, there is no question of acquiescence of counsel of choice.

THE COURT: That's correct, sir. He has taken the position on his interlocutory appeal and is still taking the position that he is entitled to select counsel of his choice and to pay those counsel beyond CJA rates from the funds which are restrained, and that as a result he is being deprived of sixth and possibly fifth amendment rights guaranteed to him under the constitution. That is his position. It remains his position.

MR. CHIKOFSKY: To reiterate for one last time we object that we have had insufficient preparation time for this hearing in order not merely to make this offer of proof but for preparation in general. The issue has been sufficiently presented to your Honor one last time to make sure there is no question for purposes of further review. We feel we have, given the press of time between the court of appeals' decision and the commencement of this trial, insufficient opportunity to properly prepare the defendant's case.

THE COURT: I would add something which I think is important.

We're about to embark on the trial itself and it is [the] government's burden of proof to establish its position be-

yond a reasonable doubt. If the government does not persuade me at the time it rests, obviously Rule 29 is available. If the court is not persuaded to grant a Rule 29 motion at that time, there is the opportunity at the close of all the evidence for a Rule 29 motion for a judgment of acquittal.

There is always the jury's verdict.

So he has, if I may say so, additional safeguards, and under the circumstances it may well be that he will succeed later where the government's burden of proof is greater than now. If he does succeed later, it seems to me that the rights that he asserted now would be available to him.

The only thing that would have happened is that he would have spent four months or thereabouts in this courtroom, or next door, receiving a preview of the government's case against him.

So I'm not sure that the harm is as total and as irreparable as you would propose it to be.

I believe the government has overwhelmingly persuaded me with regard to the two matters at this hearing. That does not mean that I would be persuaded to the appropriate degree during trial, and it certainly doesn't mean that the jury would be persuaded in the final analysis.

I would suggest that you have preserved your record in every way that you reasonabl[y] could. You sought additional time. However, on the basis of the proffer made, I did not believe that that would serve a purpose. It may well be that during the trial matters will come to your attention which could be brought to the attention of the trial court and jury and obviously will be considered in connection with the merits of the case.

Mr. Hansen, is there anything further?

MR. HANSEN: One matter in addition, your Honor.

Just to track the lines of the court of appeals' opinion. It's my understanding you found the government has es-

tablished a probability of succeeding on the two prongs stated in the opinion.

I don't believe that we ever really fully resolved the question of the standard to be applied to the hearing, whether it be appropriate or clear and convincing evidence. We have argued preponderance, but our position is, given the overwhelming nature of the evidence as the court has found it, that question is somewhat muted and under either standard the government would prevail and therefore in subsequent cases we'll argue the preponderance as the appropriate standard to apply.

THE COURT: I have found that the evidence presented here, principally in Government Exhibits 1, 2, and 3, and to a lesser extent in the hearsay testimony of Sergeant Gerhold, has overwhelmingly established a likelihood of conviction under sections 848 and 846, and that the restrained properties were obtained with the proceeds of narcotics related activities.

The government has argued that it's burden is to prove these matters by a preponderance of the evidence. The defense argues clear and convincing evidence. Since the court has found that the government sustained their burden, above and beyond the standard of clear and convincing evidence, it is unnecessary for the court to choose between the position articulated by the defense and that articulated by the government so far as the standard to be applied.

Mr. Hansen, does that clarify the matter?

MR. HANSEN: Your Honor, I thought it was perfectly clear before and we're stating it out of undue caution.

Thank you, your Honor.

There is nothing further.

MR. CHIKOFSKY: One last matter.

I understand your Honor has made his ruling based on the second circuit standard as enunciated in a recent court of appeals decision. My petition for rehearing en banc suggested that a different standard should apply. I would, for purposes of this record, make clear the standard of the fifth circuit in United States v. Thier which requires also a finding as it impacts on the defendant's right to counsel of choice, and the adversary system is another factor that should be factored in.

I realize the second circuit has not addressed that. That's part of the en banc petition nonetheless. I believe it should be brought to your Honor's attention as a relevant factor that should be considered. The second circuit, for the time being, at least, has spoken.

THE COURT: Although my initial views were different from those expressed by the second circuit, I feel bound here by what I perceive to be the law of this circuit as set forth in the majority opinion offered by Judge Mahoney in the case of United States v. Monsanto.

Is there anything further?

MR. CHIKOFSKY: Not for the defense.

MR. HANSEN: Nothing further from the government.

THE COURT: To the extent anyone believes that separate findings of fact and conclusions of law are necessary here, counsel may, if they are so advised, submit such proposed findings by January 22, 1988 at 4 p.m.

Is there anything further so far as the so-called "Monsanto hearing" is concerned?

MR. HANSEN: Nothing from the government.

MR. CHIKOFSKY: No, sir.

THE COURT: Off the record

(Discussion off the record)

THE COURT: We will adjourn at this time and resume on Tuesday, January 19, 1988, 10 a.m., in courtroom 110.

* * * * *

APPENDIX F

STATUTORY PROVISION INVOLVED

Section 853 of Title 21, United States Code (Supp. IV) provides:

Criminal forfeitures

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Meaning of term "property"

Property subject to criminal forfeiture under this section includes–

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) Third party transfers

All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d) Rebuttable presumption

There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that–

(1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter.

(e) Protective orders

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section–

(A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II of this chapter for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that–

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than

ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(f) Warrant of seizure

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) of this section may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

(g) Execution

Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

(h) Disposition of property

Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may

restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

(i) Authority of the Attorney General

With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States, in accordance with the provisions of section 881(e) of this title, of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(j) Applicability of civil forfeiture provisions

Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 881(d) of this title shall apply to a criminal forfeiture under this section.

(k) Bar on intervention

Except as provided in subsection (n) of this section, no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(l) Jurisdiction to enter orders

The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(m) Depositions

In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(n) Third party interests

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United

States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

> (A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or
>
> (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(o) Construction

The provisions of this section shall be liberally construed to effectuate its remedial purposes.

(p) Forfeiture of substitute property

If any of the property described in subsection (a) of this section, as a result of any act or omission of the defendant –

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

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OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
OCT 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. 88-454

UNITED STATES OF AMERICA,

Petitioner,

v.

PETER MONSANTO.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION OF RESPONDENT FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

Respondent Peter Monsanto asks leave to file the attached Brief of the Respondent in Opposition to the Solicitor General's petition for a writ of certiorari without prepayment of costs and to proceed in forma pauperis in this Court. Respondent has been granted leave to so proceed in the United States District Court and this status was continued in the United States Court of Appeals. No affidavit is attached, inasmuch as the U.S. District Court appointed counsel for respondent under the Criminal Justice Act of 1964 (18 U.S.C. 3006A(d)(6)).

Dated: October 13, 1988

EDWARD M. CHIKOFSKY
500 Fifth Avenue
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(212) 382-0200

Counsel for Respondent

FILED
OCT 14 1988
JOSEPH F. SPANIOL, JR.
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OPINIONS BELOW

The opinion of the court of appeals en banc (Pet. App. 1a-47a) is reported at 852 F.2d 1400. The opinion of the panel of the court of appeals (Pet. App. 48a-76a) is reported at 836 F.2d 74. The pretrial restraining order issued by the district court (Pet. App. 77a-78a); the district court's pretrial order refusing to vacate or modify the restraining order (Pet. App. 79a); and the district court's subsequent pretrial oral ruling again declining to vacate or modify the restraining order (Pet. App. 80a-88a) are unreported.

JURISDICTION

The judgment of the en banc court of appeals was entered on July 1, 1988. On August 24, 1988, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including September 14, 1988, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On July 8, 1987, respondent was charged in an unsealed indictment in the Southern District of New York with heading an illicit narcotics operation. The first two counts of the indictment charged respondent with conducting and participating in the affairs of a racketeering enterprise through a pattern of racketeering activity and conspiring to commit those offenses, in violation of the Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. 1962(c) and (d). Counts three and four charged respondent with conspiring to distribute narcotics and engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 846 and 848. The indictment (counts twelve through fourteen) also sought forfeiture under 21 U.S.C. 853 of certain specified assets which it alleged respondent acquired from the proceeds of his narcotics violations: (a) respondent's home in Mount Vernon, New York, where he resided with his family; (b) a cooperative apartment in Bronx, New York; and (c) $35,000 in cash.

On July 8, 1987 -- the same day that the indictment was unsealed -- the district court granted the government's ex parte motion, pursuant to 21 U.S.C. 853(e)(1)(A), for an order restraining respondent from selling or transferring the residence in Mount Vernon or the apartment in the Bronx (Pet. App. 77a-78a).

On August 21, 1987, respondent moved to vacate the restraining order or at least to modify it for the limited purpose of permitting him to use a portion of the restrained assets to retain private counsel to represent him in connection with the underlying criminal proceedings. The motion further sought to exempt any such legal fees paid to counsel from subsequent post-trial recoupment, in the event that respondent was convicted and the assets ultimately were forfeited to the government. On August 28, 1987, the district court denied respondent's motion to vacate or modify the restraining order, rejecting respondent's argument on both statutory and constitutional grounds (Pet. App. 79a).

2. On expedited appeal, a divided panel of the court of appeals reversed and remanded for further proceedings on December 21, 1987 (Mahoney and Cardamone, JJ.) (Oakes, J., dissenting) (836 F.2d 74) (Pet. App. 48a-76a).

(a) The panel majority rejected respondent's statutory contentions that 21 U.S.C. 853 was not intended by Congress to prohibit the payment of legitimate attorneys' fees out of seized assets subject to pretrial restraint, so long as the payment was for bona fide purposes, and was not a fraudulent or sham transaction (Pet. App. 55a-60a). The panel majority reasoned that "the plain language of the statute ... contains no exception for attorney's fees ... " (id. at 56a) and that the legislative history of the statute, while admittedly ambiguous on the question, was "certainly not clear enough to warrant departure from the plain meaning of the statute" (id. at 59a).

The panel majority also rejected respondent's contentions that such a narrow statutory interpretation violated the Fifth Amendment right to due process and the Sixth Amendment right to counsel insofar as it authorized pretrial restraint and

post-trial forfeiture of assets that a defendant intends to utilize to retain counsel of choice and gave the government an "unwholesome" power within the adversary system to effectively render a defendant de facto indigent prior to trial and to deprive him wholly of the right to private counsel, including counsel who previously may have been representing him (Pet. App. 60a-72a).

Nonetheless, the panel majority conceded that respondent was denied constitutional due process by a statutory scheme that permitted the ex parte seizure of a defendant's assets without providing some form of pretrial post-seizure hearing by which to test the propriety of the pretrial restraint (Pet. App. 64a). Without such a hearing, the panel found, to allow the government to impose indigence and deprive RICO and CCE defendants of the opportunity to retain private counsel merely by obtaining an indictment, would give it "'the ultimate tactical advantage of being able to exclude competent counsel as it chooses' simply by 'appending a charge of forfeiture to an indictment under RICO' or CCE" (id. at 64a, citing United States v. Rogers, 602 F.Supp. 1332, 1350 (D. Colo. 1985)).

Accordingly, the panel majority directed that a pretrial post-seizure hearing be held, but that the government need prove only two elements to sustain its pretrial restraint --(a) its likelihood of proving defendant's guilt beyond reasonable doubt and (b) its likelihood of proving that the assets in question were subject to forfeiture (Pet. App. 67a). Moreover, the panel majority ruled that the Federal Rules of Evidence were not applicable to such a hearing, nor were the customary injunctive "balancing" tests traditionally utilized under Rule 65 of the Federal Rules of Civil Procedure; "only the government's likelihood of success in convicting the defendant and obtaining

forfeiture of the disputed assets will be at issue." (Id. at 71a). The panel therefore remanded the case to the district court to conduct the contemplated pretrial hearing (id. at 71a-72a).

(b) Judge Oakes dissented from the panel majority (Pet. App. 72a-76a). While agreeing that an exemption of legitimate attorney's fees from the forfeiture provisions of the RICO and CCE statutes "improperly contorts the plain language of statute" (id. at 72a), Judge Oakes nonetheless held that the majority's denigration of defendant's interest in using even possibly tainted asserts to retain counsel to defend him in pending criminal proceedings "permits deference to congressional policy in the face of conflicting constitutional rights" (id.). Findings the forfeiture statute "unconstitutional at least on Sixth Amendment, and possibly on Fifth Amendment due process, grounds" (id. at 75a), Judge Oakes held that a defendant's constitutional rights were implicated "not only on the individual level of a particular defendant, but also on the institutional level of the criminal justice system as a whole" (id. at 72a). Chiding the panel majority for failure to credit the institutional interests in a fair adversary system by providing the government with an "unwholesome" power over the defendant's choice of counsel (id. at 73a-74a) and criticizing the two-pronged procedural test jerry-built by them (id. at 74a-75), Judge Oakes concluded that the statute intruded not only on the individual's right to secure counsel of choice, but also "shakes the very foundations of our criminal justice system" (id. at 76a).

3. Pursuant to the panel's mandate, the district court on remand conducted a post-seizure hearing (Pet. App. 80a-88a), and, on January 15, 1988, once again denied respondent's motion to vacate or modify the restraining order (id.). Trial was

scheduled to commence on February 16, 1988, with respondent to be represented by counsel appointed under the Criminal Justice Act (CJA), 18 U.S.C. 3006A. In the interim -- and prior to the commencement of trial -- the Court of Appeals granted rehearing en banc on January 29, 1988. Motions to sever the defendant or stay commencement of trial pending en banc review, however, were denied.

4. On July 1, 1988 -- during the course of the trial -- the Court of Appeals rendered its decision on rehearing en banc, vacating the decision of the district court (and the panel majority) and directing that the preconviction restraining order be modified to allow respondent access to the restrained assets to the extent necessary to pay legitimate (that is, non-sham) attorney's fees in connection with representation on the criminal charges against him (Pet. App. 4a). The court further held that any such fees paid to counsel were exempt from subsequent recoupment even in the event of defendant's ultimate conviction and judgment of forfeiture of the restrained assets (id.). The court's en banc decision consisted of a per curiam opinion followed by eight (8) separate concurring and dissenting opinions (Pet. App. 1a-47a).

(a) Chief Judge Feinberg, in a concurrence joined by Judges Oakes and Kearse, held that the statutory forfeiture provisions preventing the disbursement of restrained assets - to the extent that they are to be paid for the retention of counsel - violated the Sixth Amendment (Pet. App. 4a-8a). Finding the governmental interests provided by the statute insufficiently compelling to overcome a defendant's constitutional right to counsel of choice, Chief Judge Feinberg held that -- given the "condititonal" nature of the government's claim to the assets (which is not ultimately resolved until verdict) -- the defendant's constitutional rights must be accorded primacy (id. at 4a-8a). Moreover Chief Judge Feinberg noted that the court's holding did not otherwise deprive the government of its right to pretrial restraint of a defendant's assets. Rather, it frees assets "only when they are used to pay legitimate attorney's fees and when no other assets are available" (id. at 5a-6a).

(b) Judge Oakes, in a separate concurrence, reiterated his panel dissent, holding additionally that the Fifth Amendment due process clause is also implicated both because the statute "puts too much power in the hands of the prosecution to determine who will not be defense counsel . . . particularly . . . in . . . long, complicated RICO and CCE cases" where the present system of providing counsel for the indigent may not provide effective representation and because the pretrial restraint imposed smacks too closely of the Alice-in-Wonderland "sentence first, verdict afterward" model of justice (Pet. App. 8a-10a).

(c) Judge Winter, in a concurrence joined by Judges Meskill and Newman, joined the result of the majority, but felt it unnecessary to reach the constitutional question. Rather, he believed that the same result was compelled as a matter of statutory construction (Pet. App. 10a-23a). Observing that the statute was drafted in permissive "may", rather than mandatory "shall", terms, and noting the absence of congressional intent to the contrary (id. at 11a, 19a), Judge Winter held that in balancing the relative hardship of the parties, equitable principles compel the dispensation of funds -- allegedly tainted or otherwise -- for purposes of counsel fees and life's necessaries (id. at 11a-20a). Nonetheless, Judge Winter noted that all such expenditures -- while compelled -- would be conducted under court supervision, thereby preventing the gratuitous dissipation of assets during the pendency of judicial proceedings (id. at 14a,

18a). This was particularly compelling, Judge Winter found, because the preconviction restraint on ordinary lawful expenditures is a punishment and the balance of hardships tips decidedly in the accused's favor (id. at 18a-19a).

(d) Judge Miner, in a concurrence joined by Judge Altimari, held that the forfeiture statute is constitutionally defective in failing to provide for a hearing even after the issuance of a restraining order and that the hearing procedure created by the panel majority is beyond the power of the judiciary to create (Pet. App. 24a-26a). Rather, relying on such cases as Fuentes v. Shevin, 407 U.S. 67 (1972), Judge Miner held that such matters should be left to Congress after a finding of unconstitutionality (id. at 25a).

(e) Judges Mahoney, Pierce, Cardamone and Pratt dissented (Pet. App. 26a-41a; 41a-42; 42a-44a; 44a-47a), largely for the reasons stated in the panel majority opinion and Judge Mahoney's en banc dissent.

ARGUMENT

The Solicitor General argues that the en banc court of appeals' decision in this case is incorrect on both statutory and constitutional grounds, and that, moreover, there is now a conflict among the circuits on both issues. Compare, e.g., In re Forfeiture Hearing As To Caplin & Drysdale, 837 F.2d 637 (4th Cir. 1988) (en banc); United States v. Nichols, 841 F.2d 1485 (10th Cir. 1988) (pretrial restraint or post-trial forfeiture of defendants' assets not violative of Fifth and Sixth Amendments, even where applicable to attorneys' fees) with United States v. Unit No. 7 and United No. 8, etc. (Kiser), 853 F.2d 1445 (8th Cir. 1988), petition for rehearing en banc pending (filed September 16, 1988); United States v. Thier, 801 F.2d 1463

(5th Cir. 1986), modified, 809 F.2d 149 (1987); United States v. Jones, 837 F.2d 1332 (5th Cir. 1988), rehearing en banc granted, 844 F.2d 215 (1988) (argued September 19, 1988); United States v. Harvey, 814 F.2d 905 (4th Cir. 1987), vacated en banc sub nom., Caplin & Drysdale, supra (attorneys' fees may be paid pretrial out of restrained assets and post-trial out of forfeited assets on both statutory and constitutional grounds).

1. Significantly, the various courts of appeals which have considered these issues have resolved them on a multiplicity of constitutional and statutory grounds and in a variety of diverse factual settings. See, e.g., Cert. Pet. at 16-17 (collecting cases). Given the continuing nature of the litigation thus engendered by the question of pretrial restraint of defendants' assets under the RICO and CCE statutes and the potential forfeiture of such assets paid (or intended to be paid) as attorneys' fees, the prudent course for this Court may well be to allow the question to "percolate" further before interceding in order to permit the maximum discourse and dialogue among the lower courts prior to definitive resolution of the issue. See, e.g., S. Estreicher & J. Sexton, Redefining The Supreme Court's Role 50, 51, 57 (1986) ("Our system is already committed in substantial measure to the principal of percolation * * * A managerial conception of the court's role embraces lower court percolation as an affirmative value * * * Not all square conflicts between two or more courts present compelling cases for review ... The court should halt the percolation process only when the benefits to be derived from definitive resolution of the conflict outweigh the benefits of further percolation"). See also McCray v. New York, 461 U.S. 961, 963 (1983) (Stevens, J., concurrring in denial of certiorari) (certiorari denied where issue requires "further study" in lower courts "before it is addressed by this

Court"); Darr v. Burford, 339 U.S. 200, 227 (1950) (Frankfurter, J., dissenting) ("even though serious constitutional questions were raised, it seemed to at least six members of the Court ... that the question had better await the perspective of time ... or, for one reason or another, it was desirable to wait and see; or that the constitutional issue was entangled with non-constitutional issues that raised doubt whether the constitutional issue could be effectively isolated ..."); J. Harlan, Some Aspects of the Judicial Process in the Supreme Court of the United States, 33 Austl. L.J. 108 (1959) ("even where a 'true' conflict may be said to exist, certiorari will sometimes be denied where it seems likely that the conflict may be resolved as a result of future cases in the Court of Appeals ... The nub of all these qualifications is that a conflict of decisions may safely be relied upon as a ground for certiorari only in instances where it is clear that the conflict is one that can be effectively resolved only by the prompt action of the Supreme Court alone").

The percolation process on the issue of fee forfeitures is not complete. The courts of appeals have taken widely divergent analytic approaches -- some deciding the question on constitutional grounds -- e.g., Caplin & Drysdale; Nichols -- some on statutory grounds -- e.g., Thier; Jones -- and some on mixed constitutional/statutory bases -- e.g., Monsanto. These cases, and the splintered rationales that they have produced, suggests that further percolation and ongoing dialogue among the lower courts might well be fruitful, as the issues are still being sifted and refined, and the sifting process is continuing. This is especially appropriate in the instant situation, where one court has chosen to grant en banc reconsideration to the question in light of the intervening decisions in Caplin & Drysdale, Nichols, Monsanto and Kiser (the Fifth Circuit in Jones

regarding its earlier decision in Thier), another court has a petition for en banc reconsideration presently pending (the Eighth Circuit in Kiser) and two en banc courts have reversed panel decisions in their respective circuits within the last ten months (Caplin & Drysdale (4th Cir.) and Monsanto (2d Cir.)).

Moreover, putting constitutional considerations momentarily to the side, the lower courts' varying statutory interpretations of the ambit of the forfeiture legislation -- and the disparity of their rulings regarding its applicability vel non to legitimate attorneys' fees -- is a matter warranting further consideration by other courts. Given the lower courts' conflicts as to the statute's mandatory or permissive nature and the role of equitable considerations in the interpretation of the statute (compare Thier (majority opinion and Rubin, J., concurring separately) and Monsanto (en banc) (Winter, J., concurring)) with Monsanto (en banc) (Mahoney, J., dissenting)) and it is apparent that the prudent course would be to allow for further lower court consideration and development of the issue prior to plenary review by this Court.

In the instant case, for example, the en banc court of appeals posited a broad diversity of constitutional, statutory and equitable rationales for refusing to find attorney's fees properly within the ambit of the legislation. See, e.g., the separate concurring opinions of Chief Judge Feinberg, Judge Oakes, Judge Winter and Judge Miner (Pet. App. 4a passim; 8a passim; 10a passim; 24a passim). With the Fifth Circuit already having granted en banc review to the question (Jones) and with the Eighth Circuit presently entertaining an en banc rehearing suggestion (Kiser), further percolation among the lower courts may well have positive virtues.

2. Aside from further judicial percolation of these complex questions among the lower courts, the Court might well consider staying its hand in order to give Congress an opportunity to consider these weighty questions in the first instance. Even the Caplin & Drysdale en banc court virtually acknowledged that Congress had not thought sufficiently about the troubling questions raised by application of the 1984 Comprehensive Forfeiture Act (CFA) to attorneys' fees. 837 F.2d at 648-49. Although the court noted that the issue "does indeed raise many complex problems", and that "[t]he interests on each side of the controversy are weighty and profound", the court was of the view that, despite the constitutional questions raised directly, "Congress in the first instance is the proper body to deal with these issues" and that "this is not a debate that should be silenced by judicial fiat." Id. at 648-49.

That Congress had not ignored the problems may be seen from the hearings that have been held before several subcommittees of the respective House and Senate Judiciary Committees relating to money laundering and forfeiture issues. See, e.g., Current Problems of Money Laundering, Hearings Before Subcommittee on Crime, Judiciary Committee, H. R., 99th Cong., 1st Sess., September 12, 1985; Forfeiture Issues, Hearings Before Subcommittee on Crime, Judiciary Committee, H. R., 99th Cong., 1st Sess., September 25, 1985; Forfeiture of Attorneys' Fees, Hearings Before Committee on the Judiciary, U. S. Senate, 99th Cong., 1st Sess., May 13, 1986; Further Hearings Before Subcommittee on Crime, Judiciary Committee, H. R., 100th Cong., 2d Sess., March 1988.

Clearly, given the need for congressional consideration being accorded to this matter, it might be appropriate for this Court to allow Congress to consider the question in the first

instance before "silencing the debate" by "judicial fiat." Caplin & Drysdale, 837 F.2d at 649.

3. In the event that this Court should decide immediately to review the questions presented here, respondent agrees with the Solicitor General that the Court should grant review both in this case and in the case of Caplin & Drysdale v. United States, No. 87-1729 (petition for cert. pending). As the Solicitor General observes (Cert. Pet. 18), the two cases arise in fundamentally different postures: Caplin & Drysdale involves a post-conviction motion by counsel to be paid out of forfeited assets, whereas the instant case involves a pre-conviction challenge by a defendant to a restraining order. The cases thus present a variety of different questions from a procedural point of view -- issues that the Court may or may not need to reach, depending on how it resolves the substantive statutory and constitutional questions. We therefore agree with the Solicitor General that "the Court's consideration of the full range of statutory and constitutional issues presented would be assisted by having before it two cases that are in these different postures and involve parties who have somewhat different perspectives" (id. at 18).

For essentially the same reasons, however, we respectfully disagree with the Solicitor General's suggestion (id. at 22) that the two cases should be "consolidated for purposes of oral argument" under this Court's Rule 38.4. Rather, we urge that certiorari be granted in both cases and that they be heard in tandem with separate briefing and separate oral argument. See Stern, Gressman & Shapiro, Supreme Court Practice Sec. 14.6 at 589 (6th ed. 1986). Given the substantial complexity of the issues sought to be reviewed (as may be noted from the eight separate opinions issued by the en banc court of appeals in this

case), as well as the considerations mentioned by the Solicitor General, a single 30-minute argument would not permit counsel and the Court adequately to address the interrelated statutory, procedural and constitutional issues raised here.

Accordingly, while respondent would have no objection to parallel briefing schedules and oral argument in tandem, it is submitted that consolidation of the cases would prevent this Court from adequately exploring the multiple issues sought to be resolved, given what the Solicitor General concedes to be the differing factual and legal postures of each case. Thus, in the event certiorari is granted in this case and in Caplan & Drysdale, No. 87-1729, it is respectfully submitted that they be heard in tandem -- with separate oral argument -- rather than consolidated with one argument for both cases.

CONCLUSION

The petition for a writ of certiorari should be denied. Alternatively, in the event that certiorari is granted in this case as well as in the case of Caplin & Drysdale v. United States, No. 87-1729, as requested by the Solicitor General, it is respectfully requested that the cases be heard "in tandem", with separate briefs and separate oral argument.

Respectfully submitted,

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October 1988

PETITIONER'S

BRIEF

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No. 88-454

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

PETER MONSANTO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether assets that are otherwise subject to criminal forfeiture under the drug forfeiture statute, 21 U.S.C. 853 (Supp. IV 1986), are exempt from forfeiture if the defendant wishes to use them to pay counsel to represent him in the criminal prosecution.

2. Whether, if such assets are not altogether exempt from forfeiture, Section 853(e)(1)(A) authorizes a court to enter a pretrial restraining order that applies to assets that the defendant wishes to use to pay the attorney.

3. Whether, if Sections 853(a) and 853(e)(1)(A) authorize the forfeiture and pretrial restraint of such assets, those provisions are unconstitutional under the Assistance of Counsel Clause of the Sixth Amendment or the Due Process Clause of the Fifth Amendment if the attorney's resulting uncertainty about whether he will be paid his fee causes him to decline to represent the defendant.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-454

UNITED STATES OF AMERICA, PETITIONER

v.

PETER MONSANTO

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-47a) is reported at 852 F.2d 1400. The opinion of the panel of the court of appeals (Pet. App. 48a-76a) is reported at 836 F.2d 74. The restraining order issued by the district court on July 9, 1987 (Pet. App. 77a-78a); the district court's August 28, 1987, order denying respondent's motion to vacate the restraining order (Pet. App. 79a); and the district court's January 15, 1988, oral ruling again declining to vacate the restraining order (Pet. App. 80a-88a) are unreported.

JURISDICTION

The judgment of the court of appeals on rehearing en banc was entered on July 1, 1988. By order dated August 24, 1988, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including September 14, 1988. The petition was filed on that date and

was granted on November 7, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Due Process Clause of the Fifth Amendment of the United States Constitution provides:

> No person shall *** be deprived of life, liberty, or property, without due process of law; ***

2. The Sixth Amendment of the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right *** to have the Assistance of Counsel for his defence.

3. Section 853 of Title 21 of the United States Code (Supp. IV 1986), which provides for the criminal forfeiture of property that represents the proceeds of violations of the federal drug laws, is reproduced at App., *infra*, 1a-9a.

STATEMENT

1. An indictment naming respondent and 18 other defendants was unsealed in the Southern District of New York on July 8, 1987 (C.A. En Banc App. 5-38). The indictment alleged that from 1981 to 1987, respondent directed an enterprise that distributed massive amounts of heroin, received substantial illicit profits from heroin sales by his lower-tier employees, and used intimidation and violence to promote and protect the enterprise's activities (*id.* at 6-7, 10-27).[1] The first two counts of the indictment charged respondent with conducting and participating in the affairs of a racketeering enterprise through a pattern of racketeering activity, and conspiring to commit that offense, in violation

[1] The other named defendants were charged with participating as respondent's lieutenants, subordinates, and associates in the narcotics enterprise (C.A. En Banc App. 8-10).

of the Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. 1962(c) and (d) (C.A. En Banc App. 6-25). Counts 3 and 4 charged respondent with conspiring to distribute narcotics and engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 846 and 848 (1982 & Supp. IV 1986) (C.A. En Banc App. 26-34). Other counts charged respondent with illegal possession of firearms, in violation of 18 U.S.C. App. II 1202 (1982 ed.), and with income tax evasion for the years 1982 to 1985. The indictment also alleged that respondent had accumulated three specified assets as the proceeds of his narcotics trafficking: a house in Mount Vernon, New York, valued at approximately $335,000; a cooperative apartment in the Bronx, valued at approximately $30,000; and $35,000 in cash. The last three counts of the indictment sought forfeiture of those assets pursuant to 21 U.S.C. 853 (Supp. IV 1986), which mandates the forfeiture of assets that constitute or are derived from the proceeds of certain violations of the federal drug laws. Pet. App. 49a-50a.

On the day that the indictment was unsealed, the district court, pursuant to 21 U.S.C. 853(e)(1)(A) (Supp. IV 1986), granted the government's ex parte motion for an order restraining respondent from selling or transferring the residence in Mount Vernon and the apartment in the Bronx (Pet. App. 50a, 77a-78a).[2] Section 853(e)(1)(A) authorizes the court, upon application of the United States, to "enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property," where the indictment alleges that "the property with respect to which the [restraining] order is sought would, in the event of conviction, be subject to forfeiture under [Section 853]."

[2] The government had no occasion to seek a restraining order barring respondent from disposing of the $35,000 in cash, because the cash had been seized by the government (from the apartment in the Bronx) and was in the government's possession.

On August 21, 1987, respondent filed a motion to vacate or modify the restraining order, to permit him to use the restrained assets to retain private counsel to represent him in the prosecution. The motion further sought to exempt any assets that might be transferred to an attorney in payment of legal fees from subsequent forfeiture, even if respondent was convicted and the jury found that the assets that were used to pay the attorney were the proceeds of respondent's illegal drug activities.[3] Respondent contended that the forfeiture and postindictment restraining order provisions of Section 853 violate the Sixth Amendment because, by preventing a defendant from using covered assets to pay an attorney, they impermissibly interfere with the defendant's right to retain counsel of his choice. By order dated August 28, 1987, the district court denied respondent's motion to vacate or modify the restraining order. Pet. App. 79a.[4]

2. A divided panel of the court of appeals reversed and remanded for further proceedings. Pet. App. 48a-76a. The

[3] Assets of the defendant that are subject to forfeiture under Section 853 remain subject to forfeiture if they have been transferred to a third party, unless the third party establishes at a postconviction hearing under Section 853(n) that he is "a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section." 21 U.S.C. 853(c) (Supp. IV 1986).

[4] The district court indicated at a hearing on August 6, 1987, that it would permit respondent to invade the restrained assets to the extent necessary to permit him to pay counsel of his choice at a rate equal to that permitted under the Criminal Justice Act (CJA), 18 U.S.C. 3006A (1982 & Supp. IV 1986). C.A. En Banc App. 55-57; Pet. App. 50a-51a; see also *id.* at 70a-71a. James Merberg, an attorney who had engaged in discussions concerning possible representation of respondent if the government agreed not to seek forfeiture of his fees, apparently was unwilling to accept payment limited by CJA standards. In addition, the attorney who was representing respondent for purposes of the challenge to the restraining order informed the district court that several other attorneys whom he had contacted were unwilling to represent respondent at CJA-level rates. Pet. App. 50a-51a. Respondent was represented at trial by counsel who was appointed directly under the CJA.

Contrary to the district court's suggestion, forfeited property cannot be used to pay attorneys' fees even at CJA rates. Congress has addressed in considerable detail the disposition of forfeited property (see 21 U.S.C. 881(i) (Supp. IV 1986); 21 U.S.C. 881(e) (Supp. IV 1986); and 28 U.S.C. 524(c) (Supp. IV 1986)), and it has not provided for the use of those assets to pay attorneys' fees. By contrast, the CJA provides a mechanism for the appointment and payment of counsel, and it authorizes the appropriation of funds for that purpose. See 18 U.S.C. 3006A(i) (Supp. IV 1986). In view of Congress's express constitutional authority over appropriations (Art. I, § 9, Cl. 7), the courts must respect the statutory procedure by which Congress has chosen to fund the furnishing of defense services. Accordingly, if a defendant is entitled to the appointment of counsel because the forfeiture counts in the indictment render the defendant unable to retain counsel, an attorney should be appointed directly under the CJA.

panel first held that Section 853 does not exempt assets from forfeiture merely because the defendant wishes to use them to pay an attorney (Pet. App. 55a-60a). The panel reasoned that "the plain language of the statute is categorical and contains no exception for attorney's fees: 'Any person convicted of a violation . . . shall forfeit to the United States . . . (1) *any property* constituting, or derived from, any proceeds the person obtained, directly or indirectly, as a result of such violation.'" *Id.* at 56a, quoting 21 U.S.C. 853(a) (Supp. IV 1986).

The panel rejected respondent's contention that Section 853 permits the forfeiture of property that the defendant transfers to a third party (such as an attorney) only if the transfer was a sham or a fraudulent transaction. The panel noted that Section 853 contains just one exception to forfeiture for property transferred to a third person, and that exception applies only where the transferee establishes at a postconviction hearing that "he is a bona fide purchaser for value of such property who at the time of the purchase was reasonably without cause to believe that the property was

subject to forfeiture." 21 U.S.C. 853(c) (Supp. IV 1986); see also 21 U.S.C. 853(n)(6)(B) (Supp. IV 1986). The panel concluded that this language extends relief only to bona fide purchasers without notice, not to all third-party transferees except those who obtained the property in a sham or fraudulent transaction. The panel reasoned that an attorney may have notice that the property is subject to forfeiture "even though his receipt of such property in exchange for legitimate and necessary legal defense services is not fraudulent or less than an arm's length transaction" (Pet. App. 56a-57a).

The panel also rejected respondent's contention that Section 853 violates the Sixth Amendment right to counsel to the extent that it authorizes forfeiture and pretrial restraint of assets that a defendant wishes to use to pay his attorney's fee. Even where a defendant has the necessary financial resources, the panel noted, he has only a qualified right under the Sixth Amendment to retain the counsel of his choice, and his interest in doing so may be outweighed by countervailing governmental interests. *Id.* at 60a. In the present context, the panel found a substantial countervailing interest, articulated by Congress when it enacted the Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, 98 Stat. 2040, in stripping drug offenders of the economic power that they derive from their drug-related activities. In the panel's view, that interest applies equally when the drug offender seeks to use his illegally obtained economic power to pay "very considerable amounts of money" to attorneys to represent him in a RICO or CCE prosecution. *Id.* at 61a-62a. By the same token, the panel believed that respondent's position "overvalue[s] the legitimacy of a defendant's interest in using possible tainted assets" to retain counsel of his choice, since the forfeiture statute provides that "'[a]ll right, title and interest in [forfeitable] property *** *vests in the United States upon the commission of the act giving rise*

to forfeiture.'" *Id.* at 62a-63a, quoting 21 U.S.C. 853(c) (Supp. IV 1986).

While holding that there is no statutory or constitutional bar to a pretrial restraining order that has the effect of preventing a defendant from retaining private counsel of his choice, the panel held that the filing of an indictment seeking forfeiture of assets is not sufficient in itself to support such an order. Accordingly, the panel held that a district court should permit the payment of the fee charged by counsel unless the government establishes at an adversarial hearing that there is a likelihood that the jury will convict the defendant and find the property in question to be forfeitable. Pet. App. 64a-72a. The panel further ruled that if the government does not meet its burden at such a hearing, any funds that the defendant transfers to his attorney to pay a legitimate attorney's fee will thereafter be exempt from forfeiture even if the defendant is later convicted and the jury concludes that the assets transferred to the attorney in fact were the proceeds of the defendant's drug trafficking. *Id.* at 69a. Conversely, the panel stressed, if the government carries its burden at the hearing, the defendant does not have a Sixth Amendment right to use the restrained assets to pay his attorney. That is so, the panel explained, because there is "no constitutional principle requiring that a defendant whose ability to pay private counsel results solely from the possession of property which he has acquired by criminal activity, which property Congress has declared to be forfeitable, must be placed in a position preferable to that of an indigent defendant who does not have such property at his disposal." *Id.* at 70a. The panel therefore remanded the case to the district court to conduct an adversarial hearing on the continuation of the restraining order. *Id.* at 71a-72a.

Judge Oakes dissented (Pet. App. 72a-76a). He agreed with the majority that Section 853 applies to assets that the defendant wishes to use to pay his attorney (*id.* at 72a). In his view, to read the "bona fide purchaser" exception in

Section 853(c) to cover an attorney who had reasonable cause to believe that the fees he received might be derived from property subject to forfeiture would "improperly contort[ ] the plain language of the statute," because "'[n]o one is more on notice of likelihood that the money may come from . . . prohibited activity than the lawyer who is asked to represent the defendant in the trial of the indictment'" (*ibid.*, quoting *United States* v. *Badalamenti*, 614 F. Supp. 194, 196 (S.D.N.Y. 1985)). In contrast to the majority, however, Judge Oakes concluded that Section 853 violates the Sixth Amendment to the extent it permits the government to recapture assets that were used to pay the attorney's fees prior to the defendant's conviction (Pet. App. 72a-76a).

3. Pursuant to the panel's mandate, the district court on remand conducted a four-day hearing on whether to continue the order restraining respondent from transferring the two parcels of real property. The hearing consisted primarily of the testimony of the government's case agent, supported by numerous exhibits, including lists of weapons, narcotics and narcotics paraphernalia, drug ledgers, transcripts of conversations recorded pursuant to court orders for electronic surveillance, and real estate records. Respondent did not put on any evidence to rebut the government's showing. At the conclusion of the hearing on January 15, 1988, the district court once again denied respondent's motion to vacate the restraining order, finding that the government had "overwhelmingly established a likelihood of conviction under Sections 848 and 846, and that the restrained properties were obtained with the proceeds of narcotics related activities." Pet. App. 86a.[5]

[5] The district court declined to decide whether the government was required to make its showing on the basis of a preponderance of the evidence or by clear and convincing evidence, because it concluded that the government had sustained its burden "above and beyond the standard of clear and convincing evidence" (Pet. App. 86a).

Respondent's trial commenced on February 16, 1988. Respondent was represented at trial by an attorney appointed under the CJA. Pet. App. 3a. The trial lasted five months.

4. Shortly before the beginning of the trial, the court of appeals granted en banc review of the panel's decision. In its decision on rehearing en banc (Pet. App. 1a-47a), the court of appeals ordered that the preconviction restraining order be modified to allow respondent access to the restrained assets to the extent necessary to pay what the court referred to as "legitimate (that is, non-sham) attorney's fees" in connection with the criminal charges against him (*id.* at 4a). The court further held that any fees actually paid to counsel would thereafter be exempt from forfeiture under Section 853(c). Pet. App. 4a. The en banc court's disposition was set forth in a brief per curiam opinion, Pet. App. 1a-4a, which was followed by eight separate opinions concurring in or dissenting from that disposition, Pet. App. 4a-47a.

Although the en banc court voted 8-4 to vacate the restraining order, the majority was splintered in its rationale, and no more than three judges joined any of the three opinions concurring in that result.

Chief Judge Feinberg, in a brief opinion joined by Judge Oakes and Judge Kearse, did not dispute that the forfeiture provisions in Section 853 apply to assets that the defendant wishes to use to pay an attorney, but he concluded that those statutory provisions are unconstitutional under the Sixth Amendment to the extent that they do so. Pet. App. 4a-8a. Chief Judge Feinberg believed that the defendant's right to counsel of his choice cannot be infringed unless a "compelling" governmental interest outweighs that right. And the government's interests at stake in this setting, he concluded, "are not all that compelling." *Id.* at 5a. As to the interest in preventing a defendant from dissipating the assets prior to conviction, Chief Judge Feinberg found it significant that the

government's claim to the disputed assets is only "conditional," since the government's claim of ownership is not finally determined until the prosecution is completed. *Ibid.* As to the interest in preventing a defendant from benefiting from the economic power that he acquired through his illegal drug activities, Chief Judge Feinberg acknowledged that the "defendant's assets generally are a fair target for the government" and that the government does have an interest in preventing criminals from using illegally acquired economic power even to pay an attorney; but he stated that in his view, that interest does not outweigh an accused's constitutional right to the assistance of counsel of his choice. *Id.* at 6a. Chief Judge Feinberg therefore concluded that the restraining order must be vacated to the extent necessary to give respondent access to sufficient funds to retain counsel of his choice, and that the government must be prohibited from later seeking forfeiture of the funds paid to respondent's counsel of choice, "since practical considerations will keep an attorney from accepting fees based upon the contingency of success at the criminal trial." Pet. App. 7a.[6]

Judge Winter, in an opinion joined by Judge Meskill and Judge Newman, did not reach the Sixth Amendment issue because he believed the restraining order was improper on statutory grounds. He concluded that Section 853(e)(1)(A)

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[6] In addition to concurring in Chief Judge Feinberg's opinion, Judge Oakes, in a separate opinion that was not joined by any other member of the en banc court, expressed the view that the Sixth Amendment is implicated not only on the individual level of the particular defendant's right to retain counsel of his choice, but also on an institutional level, as a result of the necessary reliance in complex RICO and CCE cases on representation by public defenders and appointed counsel (Pet. App. 8a-9a). Judge Oakes also suggested that Section 853 might be unconstitutional under the Due Process Clause of the Fifth Amendment, because, in his view, it vests the prosecutor with power to decide who will not be defense counsel, creates conflicts of interest for defense counsel, and resembles a "sentence first, verdict afterward" mode of justice (Pet. App. 9a-10a).

does not permit the preconviction restraint of funds needed by a defendant to make "ordinary lawful expenditures" (including the payment of attorneys' fees) during the period from indictment to conviction, and that assets transferred by the defendant for such purposes with the authorization of the court are not subject to postconviction forfeiture. Pet. App. 10a-24a.

Judge Winter did not dispute that the broad language of Section 853(a), which provides for the forfeiture of "any property" that constitutes or is derived from the proceeds of drug activities, encompasses property that the defendant wishes to use to pay an attorney. Nor did he dispute that an attorney who has notice that the property used to pay his fees might be subject to forfeiture does not have the status of a "bona fide purchaser" under the exception for third-party transferees in Sections 853(c) and 853(n). Instead, Judge Winter reasoned that the language in Section 853(e) providing that a court "may" issue a restraining order vests the court with the power to weigh competing interests, Pet. App. 11a-14a, and he concluded that the court must invariably strike that balance so as to allow a defendant to make ordinary lawful expenditures, including those for private legal counsel, *id.* at 14a-20a. In his view, district courts may issue restraining orders only to bar "unusual lavish expenditures to accelerate consumption in the pretrial period, transfers to friends or relatives as a desirable alternative to forfeiture, or transfers for purposes of concealment." *Id.* at 16a-17a.

Judge Winter concluded that any assets that a court permits to be transferred prior to conviction are not subject to postconviction forfeiture. In reaching that conclusion, he relied on the language in Section 853(c) stating that assets transferred to a third party "may" be the subject of a special verdict of forfeiture. In Judge Winter's view, the word "may" should again be construed to vest the district court with equitable discretion; and he reasoned that in order for

the district court to vindicate its power under Section 853(e)(1) to authorize pretrial payments to third parties, the court must exercise its discretion by declining to order the post-trial forfeiture of property it previously had authorized to be transferred to an attorney or other third party.

Judge Miner, in a brief concurring opinion joined by Judge Altimari (Pet. App. 24a-26a), did not take issue with the proposition that Section 853 authorizes the forfeiture of assets that the defendant wishes to use to pay his attorney; and, unlike Chief Judge Feinberg, he believed that the Sixth Amendment would permit a court to issue a restraining order barring such payments if the court held a hearing of the sort ordered by the panel. *Id.* at 24a. However, Judge Miner concluded that the restraining order must be vacated because, in his view, Section 853 does not permit a district court to hold such a hearing on a post-indictment restraining order. *Id.* at 24a-25a.[7]

Judge Mahoney dissented in an opinion that was joined by Judge Cardamone and Judge Pierce in all but one respect. Pet. App. 26a-41a. He concluded that Section 853 authorizes the preconviction restraint and postconviction forfeiture of otherwise forfeitable assets that the defendant wishes to use to pay an attorney. *Id.* at 27a-33a. In addition, he concluded that the statute is constitutional if there is a hearing on the restraining order, *id.* at 33a-36a, and that the statute permits the court to hold such a hearing, *id.* at 36a-39a. Judge Mahoney added, however, that assets that are the subject of a preconviction hearing at which the government fails to make the requisite showing, and are then paid to an attorney, would not be subject to forfeiture under Section 853(c) even if the defendant were later convicted.

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[7] Judge Miner declined to join in the declaration in the per curiam opinion that any fees paid to an attorney are exempt from forfeiture under Section 853(c). Pet. App. 26a.

Pet. App. 39a-41a. Judge Cardamone and Judge Pierce took a somewhat different view on the last point. They filed separate opinions concluding that any assets that are actually transferred to an attorney in payment of his fee are automatically exempt from forfeiture, whether or not the court held a hearing prior to the payment. *Id.* at 41a-42a (Pierce, J.); *id.* at 42a-44a (Cardamone, J.). Judge Pratt also filed a dissenting opinion. He agreed with Judge Mahoney on the first three issues, Pet. App. 44a-47a, but found questions concerning the postconviction forfeiture of assets not to be ripe for resolution, *id.* at 46a-47a.

5. On July 25, 1988, the jury returned a verdict finding respondent guilty on all counts. On the same date, the jury also returned a special verdict finding beyond a reasonable doubt that the residence in Mount Vernon, the apartment in the Bronx, and the $35,000 in cash are the proceeds of respondent's illegal drug activities and therefore are forfeited to the United States. On October 24, 1988, the district court entered the judgment of conviction, declaring the three properties forfeited to the United States and sentencing respondent to a term of life imprisonment without possibility of parole on Count 4 and lesser terms on the remaining counts.[8]

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[8] The judgment of conviction and forfeiture does not moot either the question of the validity of the restraining order or the instant proceedings on the appeal of the district court's first order refusing to vacate the restraining order. The statute makes clear that the purpose of a restraining order is "to preserve the availability of property *** for forfeiture." 21 U.S.C. 853(e)(1) (Supp. IV 1986). Accordingly, a restraining order may properly remain in effect, even after conviction, for as long as necessary to assure that the defendant and others do not interfere with the availability of the property for forfeiture. See also 21 U.S.C. 853(g) (Supp. IV 1986) (authorizing the court to issue restraining orders to protect the property after an order of forfeiture has been entered). Consistent with this understanding, the restraining order in this case did not by its terms expire upon the entry of an order of forfeiture or the judgment of conviction or upon completion of proceedings in the

SUMMARY OF ARGUMENT

I. The drug forfeiture statute, 21 U.S.C. 853 (Supp. IV 1986), provides for the mandatory forfeiture of all assets that constitute the fruits of a narcotics trafficker's drug-related activities. The statute does not contain an express exception for funds that the defendant in a narcotics prosecution wishes to use to pay for an attorney to represent him in that case. Nor is there any basis for finding an implied exception in the statute for such purposes.

Section 853(c) of the statute, which governs the disposition of property in the hands of third parties that is subject to forfeiture, does not provide a general right to the payment of attorneys' fees. That subsection requires the mandatory forfeiture of all property that is subject to forfeiture, even if the property is in the hands of third parties, except in two narrow circumstances: where the third party had a superior interest in the property prior to the time the defendant committed the act that gave rise to the forfeiture, and where the third party can show that he was a bona fide purchaser for value who at the time he obtained the property was "reasonably without cause to believe that the property was subject to forfeiture." Neither exception is even remotely applicable in a case such as this one, where the third party (the prospective attorney) is not in possession of the property, and where, because of the notice of forfeiture provided by the indictment, the attorney would not be a bona fide purchaser without notice that the property is subject to forfeiture. More fundamentally, respondent's argument misconceives the basic nature of the provisions for

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district court on any third-party claims. See Pet. App. 77a-78a. It therefore will continue in effect during the pendency of respondent's appeal of his conviction, which is now scheduled for argument during the week of June 19, 1989. If respondent's conviction is reversed on appeal for reasons unrelated to the issuance of the restraining order, that order then would remain in effect during any retrial. Cf. *FDIC* v. *Mallen*, 108 S. Ct. 1781, 1785-1786 n.7 (1988).

third-party relief in Section 853(c): that subsection does not render transfers of forfeitable property to third parties *lawful*; rather, it protects innocent third parties from *unlawful* transfers of forfeited property by the defendant.

The legislative history of the drug forfeiture statute supports this interpretation. The background of the Comprehensive Forfeiture Act of 1984, which enacted Section 853, makes it clear that Congress was attempting to strengthen the current drug forfeiture provisions, and in particular to prevent the dissipation of forfeited assets prior to the entry of a final judgment of forfeiture. The way Congress chose to achieve that goal was to provide that property would be deemed forfeited to the United States as of the time of the com[illegible]ssion of the unlawful act that gave rise to the forfeiture. [illegible]at reason, any subsequent effort on the part of the defendant to transfer the property would be unavailing, unless the transfer satisfied the narrow exception designed to protect innocent third parties who lacked notice of the forfeiture.

Although the legislative history refers at several points to the purposes of the 1984 Act as being to prevent "sham" transactions, and "fraudulent" or "improper" transfers of assets subject to forfeiture, those references do not support respondent's contention that transfers for "legitimate" services are not subject to forfeiture. A defendant's transfer of tainted assets is always "improper" inasmuch as it tends to defeat the government's right of forfeiture. And even if Congress was especially concerned with "sham" transactions in the colloquial sense of that term, that does not ~~intend~~ mean that it did not intend to reach other transactions as well, if they fit within the clear statutory language, as does the proposed transaction that is at issue in this case. In any event, if the statute were limited to reach only "sham" transactions, the entire statutory scheme for adjudicating the rights of third parties would be upset: third parties who had obtained

tainted property in any kind of "legitimate" business transaction, even with notice of the forfeitability of the property, would be protected under the statute, even though the plain language of Sections 853(c) and 853(n)(6)(B) extends such protection only to third parties without notice of the forfeitability of the property.

II. There is likewise no constitutional defect in the procedures employed to restrain the alienation of the property at issue in this case. The probable cause established by the indictment was sufficient to justify the initial restraint on the alienation of the property. Following the remand from the court of appeals, the district court held a four-day adversarial hearing, at which the government established the high likelihood that the property would be forfeited after trial. That proceeding, and the finding that resulted from it, were amply sufficient to justify the restraint on the disposition of the property during the pendency of the trial. Indeed, the showing that was made at the hearing was even more compelling than the showing that is sufficient to support a final judgment of forfeiture in a civil forfeiture proceeding.

ARGUMENT

I. SECTION 853 DOES NOT EXEMPT FROM FORFEITURE THE PROPERTY A DEFENDANT WISHES TO USE TO PAY HIS ATTORNEY'S FEE

Respondent first argues (Br. 12-30) that assets that the defendant wants to use to pay the fee charged by an attorney representing him in the criminal prosecution are excluded from the "property" that is subject to forfeiture under Section 853. This argument was unanimously rejected by the panel below (see Pet. App. 55a-60a; *id.* at 72a (Oakes, J., dissenting)), and it was not endorsed by any member of the Second Circuit on rehearing en banc. This argument also has been unanimously rejected by the en banc Fourth Circuit, the Seventh Circuit, and the Tenth Circuit. See *United States* v. *Harvey*, 814 F.2d 905, 913-918 (4th Cir. 1987), on

rehearing en banc, *In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d 637, 641-642 (4th Cir. 1988); *id.* at 651 (Phillips, J. dissenting), cert. granted, No. 87-1729 (Nov. 7, 1988); *United States* v. *Moya-Gomez*, 860 F.2d 706, 722-723 (7th Cir. 1988); *United States* v. *Nichols*, 841 F.2d 1485, 1491-1496 (10th Cir. 1988); *id.* at 1509 (Logan, J. dissenting)).[9] Those courts were clearly right to reject the statutory claim that respondent advances.

A. The Language And Structure Of Section 853 Do Not Permit An Exception To the General Rule Of Forfeiture For Property A Defendant Wishes To Use To Pay His Attorney

The federal drug forfeiture statute, 21 U.S.C. 853 (Supp. IV 1986), is broad and unambiguous. It provides in subsection (a) that a person convicted of particular federal drug offenses "shall forfeit" certain property to the United States. The property to be forfeited includes "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as a result of such violation," and "any of the person's property" that was used or intended to be used to commit or facilitate the commission

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[9] See also *United States* v. *Long*, 654 F.2d 911 (3d Cir. 1981) (unanimously sustaining application of predecessor CCE forfeiture provision to property transferred to attorney in payment of attorneys' fees); *United States* v. *Raimondo*, 721 F.2d 476, 478 (4th Cir. 1983) (same).

The Fifth Circuit expressed the view in *United States* v. *Thier*, 801 F.2d 1463, 1474 (1986), as modified, 809 F.2d 249 (5th Cir. 1987), that Section 853 would not necessarily bar an attorney from receiving payment of his fees out of forfeited property if he filed a postconviction petition for relief under Section 853(n)(6)(B). The en banc Fifth Circuit, however, recently granted en banc review in *United States* v. *Jones*, 837 F.2d 1332 (5th Cir. 1988), to reconsider the decision in *Thier*. 844 F.2d 215 (1988). Accordingly, respondent's argument that assets paid to an attorney are not part of the property subject to forfeiture under Section 853 can no longer claim precedential support even in the rather tentative views of the Fifth Circuit panel in *Thier*.

of the offense.[10] The breadth of the forfeiture sanction is underscored by the statutory definition of the term "property" in subsection (b), which comprehensively encompasses "real property, including things growing on, affixed to, and found in land," as well as "tangible and intangible personal property, including rights, privileges, interests, claims, and securities." In the words of the panel below, this language "is categorical and contains no exception for attorney's fees" (Pet. App. 56a). As another court put the same point,

> [t]he only limitations on what property can be forfeited relate to the nexus with the illegal activity. How a defendant intends to use property that would otherwise be forfeited is irrelevant. Property is not exempted because a defendant wants to use it to pay an attorney any more than property is exempted because a defendant wants to purchase a house or employ a financial advisor.

Nichols, 841 F.2d at 1492; see also *Moya-Gomez*, 860 F.2d at 722.[11]

The two parcels of real estate that are at issue in this case are subject to forfeiture because they constitute or are

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[10] In addition, a person convicted of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848, shall forfeit "any of his interest in," "claims against," and "property or contractual rights affording a source of control over, the continuing criminal enterprise." 21 U.S.C. 853(a)(3) (Supp. IV 1986).

[11] See also *Caplin & Drysdale*, 814 F.2d at 914; 87-1729 Pet. App. 44a (the "provisions define forfeitable property without regard to its intended or actual use, whether for payment to attorneys or for other uses"). The *Caplin & Drysdale* panel considered consolidated cases arising under the forfeiture provisions of both the RICO and the drug laws, which are virtually identical, and it chose to discuss the legal issues by referring to the text of the RICO provisions (814 F.2d at 909 n.1; 87-1729 Pet. App. 33a n.1). The en banc court in *Caplin & Drysdale* specifically endorsed the panel's opinion on the statutory issue (837 F.2d at 641; 87-1729 Pet. App. 5a).

derived from the proceeds of respondent's narcotics trafficking. Nothing in Section 853(a) suggests that respondent may retain those proceeds in order to transfer them to a third party, such as an attorney. To the contrary, paragraph (1) of Section 853(a) requires the defendant to forfeit "any" such property and the concluding paragraph states that the court, when imposing sentence, "shall order" that the person forfeit to the United States "all property described in this subsection."[12]

Subsection (c) of Section 853 provides that all rights in the property that is subject to forfeiture vest in the United States "upon the commission of the act giving rise to forfeiture." As respondent acknowledges, that provision "is a codification of the common law 'taint' doctrine used in *in rem* forfeiture proceedings where, in theory, the property itself is the defendant and is deemed forfeited as of the commission of the illegal act" (Br. 12). Therefore, where a defendant has already committed an act that triggers a forfeiture under Section 853(a), he may not use the forfeited assets for any purpose: to discharge a debt; to purchase goods or services; or to pay an attorney. At that point, "[a]ll right, title and interest" the defendant once might have had in the proceeds of his narcotics trafficking have already vested in the United States. 21 U.S.C. 853(c) (Supp. IV 1986).

If the defendant treats the forfeited property as his own by attempting to transfer it to a third party, Section 853(c) provides that the property remains subject to an order of forfeiture even in the hands of the third party and "shall be ordered forfeited to the United States" except when the third party qualifies under an exacting statutory test as a

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[12] That Section 853(a) must be read broadly is underscored by Section 853(o), which explicitly directs that "[t]he provisions of [Section 853] shall be liberally construed to effectuate its remedial purposes." See *Russello* v. *United States*, 464 U.S. 16, 27 (1983); *Nichols*, 841 F.2d at 1492.

bona fide purchaser for value. Thus, a third party in possession of the property can avoid the effect of the forfeiture order only if he "establishes in a hearing pursuant to [Section 853(n)] that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture." The fact that the forfeiture order reaches property even after its transfer (unless the property is in the hands of a bona fide purchaser) reflects an intention on the part of Congress to deter third parties from accepting tainted assets from the defendant for any purpose, even as part of a transaction that is otherwise lawful, and to deprive the defendant of any benefit from forfeited property from the moment that title vests in the United States.[13]

The bona fide purchaser exemption is narrowly circumscribed. It can be raised only by a bona fide purchaser of goods and services who is reasonably without cause to believe that the property in question was subject to forfeiture at the time of the transfer. 21 U.S.C. 853(n)(6)(B) (Supp. IV 1986). The exemption thus does not create a general right for third parties to accept tainted property at any time until the United States gains possession of it; and it certainly does not create a general right in the defendant to use assets that are subject to forfeiture for whatever purposes he chooses as long as he has those assets under his control.[14]

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[13] Even with respect to cases in which the third party is able to show that he falls within the narrow exemption for bona fide purchasers, Congress made clear its determination to prevent the defendent from deriving any benefit from the tainted assets; in such cases, Section 853(p)(2) directs the court to order the forfeiture of substitute assets of the defendant to take the place of the assets that are not reachable in the hands of the bona fide purchaser.

[14] Section 853(n) contains one other exception: it provides that a court shall amend the order of forfeiture if a third-party petitioner establishes by a preponderance of the evidence that the order of forfeiture is invalid because he had a legal right, title, or interest in the property that was superior to that of the defendant at the time the defendant committed the act that gave rise to the forfeiture, *i.e.*, that the property did not even belong to the defendant when he committed the offense. 21 U.S.C. 853(n)(6)(A). That exception, which protects secured creditors, is of no aid to general creditors and certainly does not protect persons who become creditors after the commission of the acts that give rise to the forfeiture.

2. Respondent and amici concede (Resp. Br. 22; NACDL Br. 65) that Congress described the property subject to forfeiture under Section 853 in "very broad terms." See also ABA Br. 6 (the forfeiture provisions, on their face, "broadly cover all property derived from alleged criminal activity and contain no specific exemption for property used to pay bona fide attorneys' fees"). Respondent claims, nonetheless, that the statute does not bar him from paying his attorney's fees out of assets that are otherwise subject to forfeiture.

Respondent contends (Br. 14, 16, 18, 22, 24) that because Section 853 does not expressly refer to "attorneys' fees" as among the kinds of property that are forfeited, the Court may "carve out" an exception for property of that sort from the reach of the statute. That argument is based on a misconception of what it is that is forfeited under Section 853. The property that Section 853 declares forfeited is not the funds that the defendant intends to use for a particular transaction—such as the payment of attorneys' fees—but instead all the defendant's property that has been used in, or constitutes the proceeds of, his narcotics transactions. It is therefore not surprising that the statute makes no mention of attorneys' fees, just as it makes no mention of dentists' bills or car payments. The statute forfeits the defendant's drug-tainted property without regard to the uses the defendant wishes to make of that property. See *Caplin & Drysdale*, 814 F.2d at 914; 87-1729 Pet. App. 44a. Thus, the fact that attorneys' fees are not mentioned in the statute "does not mean that the language is ambiguous; rather, it suggests that

attorneys' fees were not meant to be treated differently than any other assets." *Nichols*, 841 F.2d at 1492-1493.

There is likewise no basis for respondent to contend that he should benefit from the provisions of Section 853(n)(6)(B), the statutory exemption from forfeiture for "bona fide purchasers for value." In the first place, only a third party, not the convicted defendant, can press a post-conviction claim to relief from a forfeiture under that exemption. Section 853(n)(6)(B) does not permit the *defendant* to free up forfeited property for his own use under any circumstances; that subsection instead establishes a procedure by which third parties may file a petition for relief after the defendant has been convicted and after all his interests in the property have already been formally declared forfeited to the United States.[15] In this case, there is no attorney before the Court claiming that he acquired the house in Mount Vernon or the apartment in the Bronx from respondent as payment for legal services and that he satisfies the special bona fide purchaser standard.[16] And respondent of course does not claim that he ever transferred an interest in either of the forfeited properties to an attorney; he argues only that he was prevented from doing so by the restraining

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[15] After entry of an order of forfeiture, the United States must publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct, and must furnish written notice to any person who is known to have alleged an interest in the property. 21 U.S.C. 853(n)(1) (Supp. IV 1986). Any person asserting a legal interest in the property must file a petition within 30 days requesting the court to adjudicate his interest. 21 U.S.C. 853(n)(2) (Supp. IV 1986). A hearing must be held within 30 days, to the extent practicable, 21 U.S.C. 853(n)(4) (Supp. IV 1986), and the court at the hearing may consider evidence presented by both the petitioner and the United States, as well as relevant portions of the record in the criminal case that resulted in the order of forfeiture, 21 U.S.C. 853(n)(5) (Supp. IV 1986).

[16] We will assume for present purposes that an attorney who accepts title to property as payment of his fee would be a "purchaser" within the meaning of the bona fide purchaser exception.

order. Subsection (n)(6)(B), however, affords protection only where the property was actually transferred.

Second, even if respondent had purported to transfer the house in Mount Vernon and the apartment in the Bronx to an attorney in payment of legal fees, the attorney could not have established that he was a bona fide purchaser for value who at the time of the transfer was reasonably without cause to believe that the property was subject to forfeiture: the forfeiture counts in the indictment and the restraining order would have given him reason to believe that the property was subject to forfeiture. See Pet. App. 72a (Oakes, J. dissenting) ("Reading the 'bona fide' purchaser provision *** to cover attorneys who have reasonable cause to believe their fees might be payable out of property subject to forfeiture improperly contorts the plain language of the statute.").[17] Compare *E.D. Systems Corp.* v. *Southwestern Bell Tel.*, 674 F.2d 453, 460 (5th Cir. 1982). In fact, the petitioner law firm in *Caplin & Drysdale*, which did file a third-party claim under subsection (n) after its client pleaded guilty and consented to forfeiture, concedes (Br. 31) that lawyers generally could not satisfy this prerequisite to relief and that the law firm could not do so in that case. See also N.Y. City Bar Ass'n Br. 4.[18]

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[17] But cf. *United States* v. *Thier*, 801 F.2d 1474, as amended 809 F.2d 249 (5th Cir. 1987) ("a defense lawyer's knowledge of the charges against the client does not *ipso facto* disqualify the attorney's claim to be a bona fide purchaser under the RICO and CCE forfeiture provisions").

[18] Amici NACDL *et al.* argue (Br. 67-73) that the presence of the word "reasonably" in the phrase "reasonably without cause to believe that the property was subject to forfeiture" indicates that Congress intended subsection (n)(6)(B) to grant a court the authority to exempt property from forfeiture whenever it believes it would be "reasonable" to do so. Amici then contend that it would always be unreasonable to subject property needed to pay "legitimate" attorney's fees to forfeiture. This semantic argument is unconvincing.

Amici point to no indication in the text or legislative history of Section 853 even remotely suggesting that the phrase "reasonably without

Third, Section 853(n)(6)(B) does not support respondent's claim that the statute authorizes the payment of attorneys' fees from forfeitable assets, because subsection (n)(6)(B) does not authorize the defendant to make a preconviction transfer of tainted assets to anyone.[19] That subsection merely furnishes special protection to an innocent third party despite the defendant's unlawful transfer of tainted assets; it does not retroactively render the transfer lawful from the defendant's perspective. Subsection (n)(6)(B) therefore provides no support for respondent's contention that the district court should have vacated the pretrial restraining order so that he could convey the house in

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cause to believe that the property was subject to forfeiture" was intended to confer some sort of general dispensing power on the courts. That phrase merely serves to define the degree of suspicion about the tainted nature of the property that is sufficient to disqualify a third-party petitioner from relief. The natural reading of the quoted phrase is that a third-party petitioner not only must have *actually* been without cause to believe that the property was subject to forfeiture—*i.e.*, must have been subjectively unaware of circumstances that would create suspicion—but also that his unawareness of those circumstances must have been objectively reasonable, rather than the product of willful or idiosyncratic ignorance. See *United States* v. *$10,694.00 U.S. Currency*, 828 F.2d 233, 235 n.3 (4th Cir. 1987). That interpretation is supported by the Senate Report, which explains that the bona fide purchaser exemption applies where the petitioner "had no reason to believe that the property was subject to forfeiture" (S. Rep. No. 225, 98th Cong., 1st Sess. 209 (1983)). The House Report explains the quoted language in similar terms. See H.R. Rep. No. 845 (Pt. 1), 98th Cong., 2d Sess. 18 (1984) ("the petitioner did not know or have reason to know of the offense or any restraining order in the transfer of the property"); see *id.* at 38-39. At least after the indictment was returned, an attorney representing respondent could not have satisfied this standard.

[19] Amici NACDL *et al.* concede as much. They state (Br. 88 n.* (emphasis in original)): "We doubt also that the bfp exemption was actually *designed* to protect against forfeiture of attorneys' fees, although it may have this effect. This provision purports to operate only after the trial is over."

Mount Vernon and the apartment in the Bronx to an attorney.[20]

In sum, as the en banc Fourth Circuit concluded in *Caplin & Drysdale*, the language of Section 853 "is unmistakably clear, and so plainly reaches property used or intended to be used for attorneys' fees that the inquiry should end without resort to legislative history" (837 F.2d at 641; 87-1729 Pet. App. 5a). In the next section, however, we show that the legislative history confirms the broad scope of the statute and further undermines respondent's argument in favor of a special statutory exemption for assets that are used to pay attorneys' fees.

B. The Legislative History Of Section 853 Does Not Support Recognition Of An Exemption From Forfeiture

The unambiguous and all-encompassing language of the criminal forfeiture provisions must control "in the absence of a 'clearly expressed legislative intent to the contrary.'" *Russello* v. *United States*, 464 U.S. 16, 20 (1983). In this case, far from expressing a clear congressional intent to the contrary, the legislative history supports our reading of the statutory text.

Congress enacted the Comprehensive Forfeiture Act of 1984, of which Section 853 is a central feature, to strengthen the prior criminal forfeiture provisions that had been enacted as part of the CCE and RICO statutes.[21] See

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[20] If respondent had actually retained a lawyer and transferred some of the forfeited property to the attorney to pay the attorney's fee, that property would remain subject to forfeiture by virtue of Section 853(c) unless the attorney satisfied the special bona fide purchaser test under subsection (n)(6)(B). The absence of a specific mention of "attorneys' fees" in subsection (c) or (n)(6)(B) would be irrelevant in that situation as well, because the forfeiture sanction would attach not to the "fees" charged by the attorney, but to the tainted property that the client attempted to use to pay those fees.

[21] See 18 U.S.C. 1963(c) (1982), enacted as Section 901(a) of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 943;

S. Rep. No. 225, *supra*, at 191. This Court in *Russello* gave the predecessor RICO forfeiture statute a broad reading and declined to recognize an implied exception from forfeiture for certain property interests. See 464 U.S. at 20-29. When Congress passed the Comprehensive Forfeiture Act of 1984, it was aware of the broad reading given to the definition of forfeitable property in *Russello* and it ratified the specific holding in that case. See H.R. Rep. No. 845 (Pt. 1), at 6; 18 U.S.C. 1963(a)(3) (Supp. IV 1986); see also 21 U.S.C. 853(a)(1) (Supp. IV 1986).

1. The legislative history demonstrates that Congress intended the 1984 Act to make the criminal forfeiture provisions more effective by closing specific loopholes. Of particular relevance here, Congress acknowledged that "the criminal forfeiture provisions * * * [had] fail[ed] adequately to address the phenomenon of defendants defeating forfeiture by removing, transferring, or concealing their assets prior to conviction" (S. Rep. No. 225, *supra*, at 195). Congress therefore found it necessary to "address the serious problem of a defendant's pretrial disposition of his assets," stressing that "[c]hanges [were] necessary both to preserve the availability of a defendant's assets for criminal forfeiture, and, in those cases in which he does transfer * * * his property, to assure that he cannot as a result avoid the economic impact of forfeiture" (*id.* at 196). See also H.R. Rep. No. 845 (Pt. 1), *supra*, at 7 (expressing concern about "dissipation of the assets either before or after indictment"); *id.* at 18, 19. Congress addressed the problem of preconviction transfers in two ways, and the background of each further undermines respondent's claim that he could avoid forfeiture under Section 853 by transferring assets to an attorney.

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and 21 U.S.C. 848(a)(2), enacted as Section 408(a)(2) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1265-1266.

Congress responded first by enacting Section 853(c), the provision that effects the transfer of property rights in the forfeited property at the time of the commission of the act that gives rise to the forfeiture. The Senate Report explained that subsection (c) "is a codification of the 'taint' theory which has long been recognized in forfeiture cases," and it cited as a model this Court's decision in *United States* v. *Stowell*, 133 U.S. 1 (1890), and the Ninth Circuit's decision in *Simons* v. *United States*, 541 F.2d 1351, 1352 (9th Cir. 1976). See S. Rep. No. 225, *supra*, at 200 & n. 27.

In *Stowell*, the Court explained that under the "taint" principle, the forfeiture took effect as soon as the unlawful act occurred, and it "operated from that time as a statutory conveyance to the United States of all rights, title and interest then remaining" in the owner. 133 U.S. at 19. The effect of that "statutory conveyance" was that the "right so vested in the United States could not be defeated or impaired by any subsequent dealings" of the owner with a third party. *Ibid.* The *Simons* case made the same point even more explicitly. It explained that the forfeiture "relates back [to the moment the illegal act is committed] and avoids all intermediate sales and alienations, even as to purchasers in good faith." 541 F.2d at 1352.

The legislative history shows that Congress had transfers to attorneys specifically in mind when it enacted subsection (c). Thus, the Senate Report stated that "[a]bsent application of this [*Stowell*] principle a defendant could attempt to avoid criminal forfeiture by transferring his property to another person prior to conviction" (S. Rep. No. 225, *supra*, at 200); and it then noted with approval (*id.* at 200 n.28) that "[t]his result was not permitted in *United States* v. *Long*, 654 F.2d 911 (3d Cir. 1981), in which it was held that property derived from a violation of 21 U.S.C. 848 remained subject to criminal forfeiture although transferred to the defendant's attorneys more than six months prior to conviction, and that an order restraining the attorneys from

transferring or selling the property was properly entered." That passage is sufficient in itself to refute respondent's assertion (Br. 14) that property paid or to be paid to attorneys should be excluded from the property subject to forfeiture under Section 853, on the ground that Congress never adverted to the problem of payments to attorneys.[22]

Congress also responded to the problem of preconviction transfers by enacting Section 853(e), which was intended to augment the authority of the courts to issue both preindictment and postindictment restraining orders preventing the defendant from selling or otherwise transferring his property. Subsection (e) itself states that such orders are intended "to preserve the availability of property *** for forfeiture," and the Senate Report underscored that such orders are "essential" devices "to preserve the status quo, *i.e.*, to assure the availability of the property pending disposition of the criminal case" (S. Rep. No. 225, *supra*, at 204). The House Report also broadly described the restraining-order provision as enabling courts "to protect the availability of property that may be subject to criminal forfeiture" (H.R. Rep. No. 845 (Pt. 1), *supra*, at 19). In light of the intense congressional concern with avoiding the dissipation of forfeited assets prior to conviction, and the absence of any exception, express or implied, to the prohibition against a defendant's transfer of tainted assets to third parties, there is no force to respondent's suggestion that Congress must have

[22] See also *Forfeiture in Drug Cases: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 1st & 2d Sess. 167 (1981 & 1982) (statement by Justice Department witness discussing *Long*). Even if the legislative history were to the contrary and indicated that Congress did not specifically consider the application of the statute to assets used or to be used to pay attorneys' fees, that would not furnish a basis for a court to exempt such assets from forfeiture. "[T]he 'fact that [a law] has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" *Nichols*, 841 F.2d at 1493, quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985).

intended to permit defendants to use "tainted" assets to purchase legal services.

2. The petitioner in *Caplin & Drysdale* relies (87-1729 Br. 3, 22) on a passage in the portion of the House Report discussing the restraining order provision, which states that "[n]othing in this section is intended to interfere with a person's Sixth Amendment right to counsel" (H.R. Rep. No. 845 (Pt. 1), *supra*, at 19 n.1). See also Resp. Br. 14 n.8; NACDL Br. 77-79. That sentence, however, does nothing more than state the Committee's intention that the new statute not be applied in a manner that would violate the Constitution. As we discuss below and at greater length in our brief in the *Caplin & Drysdale* case, a prohibition against using tainted assets to pay an attorney does not violate the Sixth Amendment as long as the defendant obtains or is provided with competent counsel to represent him. If that is so, the House Committee's concern is satisfied, and there is no need to worry that applying Section 853 as it is written will result in Sixth Amendment violations. At minimum, the House Committee's suggestion that the constitutional validity of pretrial restraining orders in particular cases should be left to the courts (see H.R. Rep. No. 845 (Pt. 1), *supra*, at 19 n.1), "belies any intention to establish a statutory rule concerning forfeiture of attorney's fees" (Pet. App. 58a). Accord *Moya-Gomez*, 860 F.2d at 722; *Nichols*, 841 F.2d at 1495-1496.[23]

[23] The conclusion that Congress did not intend to fashion a statutory exclusion for all assets used or to be used to pay attorneys' fees also is supported by the House Judiciary Committee's criticism elsewhere in its Report of the result of the government's forfeiture efforts in *United States v. Meinster*, No. 79-105-CR-JKL (S.D. Fla.), which was frequently discussed as an example of how forfeiture efforts had been frustrated. See, *e.g.*, *Forfeiture of Narcotics Proceeds: Hearings Before the Subcomm. on Criminal Justice of the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. 19, 51-55, 92 (1980); Pet. App. 31a-32a (Mahoney, J., dissenting). In the *Meinster* case the government obtained only about $16,000 out of seized assets valued at approximately $750,000, and the seized assets

3. Respondent quotes (Resp. Br. 13-14, 17, 22) several passages in the Senate Report on the 1984 Act stating that the purpose of subsections (c) and (n) of Section 853 was to ensure that pretrial transfers that were "improper," "fraudulent," "sham" or not "arms' length" would be voided. See S. Rep. No. 225, *supra*, at 194-196, 200-201, 209 & n.47. Relying on these passages, respondent contends that Section 853 should not be read to bar the payment of "legitimate" attorneys' fees for "bona fide" legal services out of forfeited property. See also 87-1729 Pet. Br. 26, 29; NACDL Br. 80-81. This argument is without merit for several reasons.

In the first place, respondent and the petitioner in *Caplin & Drysdale* focus on the wrong issue when they claim that the references to "improper" and "fraudulent" transfers cannot apply to the payment of legitimate attorneys' fees. As we have noted, the forfeiture statute focuses on the tainted nature of the property that is used by the defendant, and the United States' superior claim to that property. It

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themselves were only a small part of an estimated gross return to the drug enterprise of $300 million. The $750,000 was depleted in substantial part by the court-directed sale of assets to pay $559,000 in attorneys' fees. The House Report was critical of the net result in the case. H.R. Rep. No. 845 (Pt. 1), *supra*, at 3; see also *id.* at 19 n.1.

Concern about the use of the proceeds of organized crime activities to pay large fees to attorneys also was reflected in the legislative history of the Organized Crime Control Act of 1970, in which the original RICO forfeiture provision was enacted. In his Message on Organized Crime that urged the passage of sweeping new legislation, President Nixon noted that illegal gambling enterprises "provide[ ] the bulk of the revenues that eventually go into * * * bribes of police and local officials * * * and * * * pay for the large stables of lawyers and accountants and assorted professional men who are in the hire of organized crime" (H.R. Doc. No. 105, 91st Cong., 1st Sess. 6 (1969)). See also 116 Cong. Rec. 591 (1970) (remarks of Sen. McClellan) (same); *id.* at 35,313 (remarks of Rep. Leggett) (noting that gamblers and other members of organized crime derive enormous illegal profits out of which it paid certain operating expenses, including "batteries of high-priced legal talent").

does not focus on the "legitimacy" of the services that the defendant has purchased with the tainted funds. Section 853 bars the defendant from using assets that are subject to forfeiture to discharge a debt or make a purchase even if the underlying transaction and the amount charged to the defendant are entirely "legitimate." Accordingly, a transfer of forfeited property can fairly be said to be "improper" or "fraudulent," regardless of the legitimacy of the underlying transaction, if the defendant knows and the transferee knows or has reason to believe that the property is the fruit of a drug transaction and that the transfer would therefore be in derogation of the government's paramount right to the property.[24]

Moreover, contrary to respondent's contention, the concern expressed in the Senate Report about preconviction transfers that are not "arm's length" has considerable force in this setting as well, since a defendant whose assets are probably going to be declared forfeited to the United States in any event may have little incentive to bargain with an attorney for the payment of only a "reasonable" fee out of the forfeited assets. In this case, for example, respondent apparently was prepared to convey his house in Mount Vernon and his apartment in the Bronx, which he maintained were virtually his only assets, as payment for legal representation. It seems most unlikely that a defendant would so readily and completely divest himself of his holdings—or that an attorney would charge a fee of that magnitude and insist that the defendant convey or sell virtually all his assets to pay it—in the absence of forfeiture counts in the indictment.[25]

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[24] See 11 U.S.C. 548 ("Fraudulent transfers and obligations."); G. Glenn, *The Law of Fraudulent Conveyances* 1 (1931) ("The fraudulent conveyance, as known in our law, may be roughly defined as an infringement of the creditor's right to realize upon the available assets of his debtor.").

[25] Other cases that have arisen in this area raise the same concern. For example, in *United States* v. *Henderson*, 844 F.2d 685, 687 (9th Cir.

In any event, as the Fourth Circuit panel observed in *Caplin & Drysdale*, the passages cited by respondent do not suggest that Congress intended that *only* "sham," "fraudulent" or non-"arm's length" transfers to third parties—in the narrow sense in which respondent uses those terms—would be voided (814 F.2d at 916-917; 87-1729 Pet. App. 49a-50a). While transfers of that kind may have been of special concern to the Senate Committee, there is nothing in the Report to support the inference that transfers not sharing each of those characteristics fall outside the statute. Compare *Jefferson County Pharmaceutical Ass'n* v. *Abbott Laboratories*, 460 U.S. 150, 159 n.18 (1983); *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 110-111 (1980).[26] To the contrary, the Senate Report establishes only that *bona fide* purchasers who have no notice of the taint on the property will be exempt from the forfeiture penalty. Indeed, other passages in the Senate Report rebut the inference respondent seeks to draw from

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1988), the district court had determined that "reasonable, bona fide attorneys fees of $500,000 for pretrial work would be exempted from defendants' assets, and that an additional $17,500 would be exempted for each week of trial." Similarly, the defendant in *United States* v. *Unit No. 7 & Unit No. 8*, 853 F.2d 1445 (8th Cir. 1988), urged the district court that $500,000 "would be a reasonable fee in this case." *Id.* at 1447 n.2. Compare *United States* v. *Hand*, 863 F.2d 1100 (3d Cir., 1988) (restitution ordered to the government in the amount of $46,850, representing the costs to the government of prosecuting a seven-week trial, after two weeks of trial preparation; the costs included the salaries of two prosecutors and two federal drug agents, travel costs for the prosecutors and agents, and witnesses' fees and travel expenses).

[26] This Court enunciated that same principle in its first decision interpreting the RICO statute, where the defendant argued that the legislative history discussed only the government's efforts to prevent the infiltration of legitimate enterprises. Rejecting that narrow interpretation, the Court noted that "none of these statements requires the negative inference that [the statute] did not reach the activities of enterprises organized and existing for criminal purposes." *United States* v. *Turkette*, 452 U.S. 576, 591 (1981); see also *United States* v. *Naftalin*, 441 U.S. 768, 774-775 (1979).

the references to "sham" transfers. For example, the Report stated that a defendant should not be shielded from forfeiture "simply by transferring an asset to a third party." It also explained that the 1984 amendments were necessary "to preserve the availability of a defendant's assets for criminal forfeiture, and, in those cases in which he does transfer, deplete, or conceal his property, to assure that he cannot as a result avoid the economic impact of forfeiture." S. Rep. No. 225, *supra*, at 196. Those characterizations of the purposes of the 1984 amendments reflect "a clear congressional intent to make voidable a wider range of asset transfers than just sham or fraudulent ones." *Caplin & Drysdale*, 814 F.2d at 917; 87-1729 Pet. App. 50a; accord *Nichols*, 841 F.2d at 1494-1495.

It also is significant that respondent's argument based on these passages in the Senate Report is not logically limited to assets that the defendant proposes to use to pay attorneys' fees; that argument would exempt *all* transfers to third parties, except where the government could establish fraud on the part of the transferee. That interpretation would "read the bona fide purchaser requirement right out of the statute" (*Caplin & Drysdale*, 837 F.2d at 642; 87-1729 Pet. App. 6a), since subsections (c) and (n)(6)(B) both explicitly limit relief to those transferees who not only are bona fide purchasers for value, but also were reasonably without cause to believe that the property was subject to forfeiture. See also *Nichols*, 841 F.2d at 1494. In light of the great care that Congress took in the statute to draft the bona fide purchaser exemption very narrowly, the references to "sham" transfers in the Senate Report cannot fairly be taken as marking the limits of the forfeiture sanction as applied to funds the defendant seeks to transfer to third parties.

4. Respondent's claim to an exemption is further undermined by the fact that although the defense bar has repeatedly urged Congress since the Comprehensive Forfeiture Act of 1984 was passed to exclude from forfeiture those

assets that the defendant wants to use to pay an attorney, Congress has declined to do so. For example, in a hearing before the House Judiciary Committee in 1985, representatives of amici American Bar Association and NACDL urged Congress to enact such an amendment to the Comprehensive Forfeiture Act of 1984.[27] The Senate Judiciary Committee conducted a hearing on the same subject in May 1986, receiving submissions from those groups, the Department of Justice, and others both favoring and opposing such an amendment.[28] Yet while Congress amended Section 853 and the parallel RICO forfeiture provision in another respect later in 1986,[29] Congress did not enact the requested exemption for attorneys' fees.

The background of the Money Laundering Control Act of 1986, which was enacted as part of the same public law in which Congress amended Section 853,[30] indicates that Congress's decision not to enact such an exemption in Section 853 was deliberate. The Money Laundering Act makes it a criminal offense for any person knowingly to engage in certain transactions in property that was derived from specified criminal activities, including CCE and RICO offenses.

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[27] See *Forfeiture Issues: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 187-245 (1985). Respondent quotes (Br. 16 n.9) a statement by Representative Shaw during the 1985 Hearing (at 233) stating that Section 853 did not contemplate the forfeiture of attorneys' fees. Respondent fails to point out, however, that Representative Shaw expressed concern about addressing that issue by making a "special case" for lawyers and setting attorneys' fees as "something that is special above all others" (*1985 Hearing* at 233-234).

[28] See generally *Attorneys' Fees Forfeiture: Hearing before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. (1986).

[29] See Pub. L. No. 99-570, §§1153(b), 1864, 100 Stat. 3207-13, 3207-54, adding the substitute asset provisions now codified at 21 U.S.C. 853(p) (Supp. IV 1986) and 18 U.S.C. 1963(n) (Supp. IV 1986).

[30] See Pub. L. No. 99-570, §1352(a), 100 Stat. 3207-18 to 3207-21, codified at 18 U.S.C. 1956 and 1957 (Supp. IV 1986).

18 U.S.C. 1957(a) (Supp. IV 1986). The House version of the 1986 bill contained a proviso stating that this prohibition "does not apply to financial transactions involving the bona fide fees an attorney accepts for representing a client in a criminal investigation or any proceeding arising therefrom." See H.R. Rep. No. 855 (Pt. 1), 99th Cong., 2d Sess. 14 (1986). That proviso, however, was deleted from the bill as finally enacted.

Moreover, the legislative history of the Money Laundering Control Act makes clear that the omitted proviso was included in the House bill only for the purpose of relieving attorneys of the risk of criminal *prosecution* if they deposited their fees in a financial institution. The proviso did not reflect a congressional judgment that assets in the possession of the defendant should be exempt from *forfeiture* whenever the defendant wants to use them to pay his attorney. To the contrary, during the mark-up session at which the proviso was adopted, Representative Lungren, who supported the exemption from criminal liability, made clear that funds used (or to be used) to pay an attorney would remain subject to forfeiture under applicable law:

> We are in the proverbial rock and hard place situation, and I think it is better to keep section 1 and make this one specific exception for attorneys because of the unique situation they find themselves in. On the other hand, we have got the Defense Bar complaining now about the forfeiture provision, and I am not sympathetic to them on that. They would still be subject to the forfeiture proceedings.
>
> They could find themselves out because the money would not be available to them because the attorney would discover at some point in time the government has the right to get those funds, but that is different than telling an attorney he might have to draw a curtain

between himself and his client for fear of criminal activities.

Markup Session on H.R. 5077 by the Subcomm. on Crime of the House Comm. on the Judiciary, 99th Cong., 2d Sess. 16-17 (July 16, 1986). Other Members opposed a special exemption for attorneys even from the criminal sanctions, *id.* at 15 (Rep. Mazzoli); *id.* at 22 (Rep. Shaw), and several Members who supported that narrow exemption nevertheless expressed misgivings about affording lawyers preferred treatment, *id.* at 10, 33 (Rep. Hughes); *id.* at 12-13 (Rep. McCollum). The House Report also explained that the proposed proviso would have furnished an exemption from criminal liability, but there is no suggestion in the Report that the proviso was intended to provide an exemption from statutory forfeiture provisions. See H.R. Rep. No. 855, *supra*, at 14.[31] There is no reason for this Court to fashion

[31] Explanatory statements inserted into the extension-of-remarks section of the Congressional Record likewise refer only to a possible exemption from the new criminal sanctions, with no suggestion of an intent to exempt attorneys' fees from forfeiture. 132 Cong. Rec. E3822 (daily ed. Nov. 6, 1986) (remarks of Rep. McCollum); see also *id.* at E3827 (remarks of Rep. Hughes.)

In 1988, Congress did amend 18 U.S.C. 1957(f)(1) (Supp. IV 1986) to provide that the term "monetary transaction" does not "include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution." Anti-Drug Abuse Amendment Act, Pub. L. No. 100-690, §6182, 102 Stat. 4354. Once again, however, in spite of continuing pressure from the defense bar, see *Forfeiture Portions of the Comprehensive Crime Bill and the Anti-Drug Abuse Act of 1986: Hearing before the Subcomm. on Crime of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 85-231 (1987); *Field Hearing on Federal Drug Forfeiture Activity before the Subcomm. on Crime of the House Judiciary Comm.*, 100th Cong., 2d Sess. 169-178 (1988), Congress did not go so far as to enact a statutory exemption from forfeiture that would permit a defendant to use forfeited assets to pay attorneys' fees.

an attorneys' fee exception to Section 853 that Congress declined to enact when it revisited the subject in 1986.[32]

II. THE CONSTITUTION DOES NOT REQUIRE AN EXEMPTION FROM POST-TRIAL FORFEITURE OR PRETRIAL RESTRAINT FOR THOSE ASSETS THAT THE DEFENDANT WANTS TO USE TO PAY HIS ATTORNEY

Respondent argues (Br. 30-50) that if Section 853 is not construed to exempt from forfeiture any assets identified in the indictment that the defendant wants to use to pay his attorney, it unconstitutionally interferes with his qualified Sixth Amendment right to the assistance of counsel of his choice and violates the Due Process Clause of the Fifth Amendment. We demonstrate in our brief in *Caplin & Drysdale* (at 32-46), however, that the Constitution does not require Congress to permit a defendant to use the illicit proceeds of his narcotics trafficking to pay legal fees. There is no need to repeat that discussion here.[33] We shall limit our discussion here to respondent's contention that it was

[32] Citing *N.L.R.B.* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979), respondent contends (Br. 20-23) that the Court should avoid the question of the constitutionality of Section 853 by construing it not to require the forfeiture of the proceeds of narcotics trafficking that the defendant wishes to pay to his attorney. This Court has made clear, however, that although "'[s]tatutes should be construed to avoid constitutional questions, *** this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature.'" *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 493 n.11 (1985), quoting *United States* v. *Albertini*, 472 U.S. 675, 680 (1985). Where, as here, the statutory language admits of only one interpretation and the legislative history supports that reading, the statutory language must be respected even if constitutional issues are presented as a result. Cf. *Sedima*, 473 U.S. at 495-496 n.13.

[33] Respondent, unlike the petitioner in *Caplin & Drysdale*, argues (Br. 31-36) that the incidental effect of Section 853 on the ability of a defendant to retain private counsel can be sustained only by a "compelling" governmental interest. However, none of the decisions of this Court or of the courts of appeals upon which respondent relies (Br. 31-32) supports that proposition.

wrong for the court to prevent him from disposing of the house in Mount Vernon and the apartment in the Bronx before he was actually convicted of the offenses charged in the indictment, and that the procedures employed by the district court were inadequate.

Respondent's attack on the fairness of the proceedings below is unfounded. In the first place, the pretrial restraining order was not an arbitrarily imposed limitation on respondent's enjoyment of his assets. It was issued pursuant to Section 853(e)(1)(A) on the basis of the indictment, which formally charged petitioner with engaging in a continuing criminal enterprise and alleged that the specific properties at issue constituted the proceeds of that enterprise's narcotics trafficking. The indictment therefore represented a determination of probable cause to believe that respondent had committed the crimes with which he

In *Wheat* v. *United States*, 108 S.Ct. 1692, 1697 (1988), the Court stated that the right to select and be represented by one's preferred counsel is "comprehended" by the Sixth Amendment, but emphasized that the primary purpose of the Sixth Amendment is to ensure that the defendant receives a fair trial and that the right to counsel of choice is qualified in important respects. Similarly, in *Powell* v. *Alabama*, 287 U.S. 45, 53, 69 (1932), the Court held only that the defendant is entitled to a "fair opportunity" to retain counsel, which cannot be "arbitrarily" interfered with. Accord *Chandler* v. *Fretag*, 348 U.S. 3, 9-10 (1954); *Glasser* v. *United States*, 315 U.S. 60, 70 (1942). All of the court of appeals decisions cited by respondent use similar formulations, stressing that the defendant's rights may not be "arbitrarily" interfered with. See *United States* v. *Rankin*, 779 F.2d 956, 958, 960 (3d Cir. 1986); *Wilson* v. *Mintzes*, 761 F.2d 275, 281 (6th Cir. 1985); *United States* v. *Phillips*, 699 F.2d 798, 802 (6th Cir. 1983); *Linton* v. *Perini*, 656 F.2d 207, 208, 211 (6th Cir. 1981); *United States* v. *Laura*, 607 F.2d 52, 56, 57 (3d Cir. 1979). As we explain in our brief in *Caplin & Drysdale*, there is nothing arbitrary about applying the same uniform and mandatory rules to assets used to pay legal fees as to assets that are used for other purposes. Finally, contrary to respondent's contention (Br. 34 n.16), the First Amendment does not require any justification for Section 853 beyond that required by the Sixth Amendment. See *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 334-335 (1985).

was charged and that the properties were subject to forfeiture as the proceeds of those offenses. See *Nichols*, 841 F.2d at 1491 n.4.[34] This Court has made it clear that an indictment that is fair on its face and is returned by a properly constituted grand jury "conclusively determines the existence of probable cause" and is a sufficient predicate for subjecting the defendant to restraints on his liberty pending trial. See *Gerstein* v. *Pugh*, 420 U.S. 103, 117 n.19 (1975). An analogous probable cause determination therefore should be a constitutionally adequate basis for the much less intrusive step of imposing restraints on the alienation of certain property pending trial. *FDIC* v. *Mallen*, 108 S.Ct. at 1788; see S. Rep. No. 225, *supra*, at 202 ("the probable cause established in the indictment or information is, in itself, *** a sufficient basis for issuance of a restraining order"); see generally *id.* at 202-204. But see *United States* v. *Crozier*, 777 F.2d 1376, 1383-1384 (9th Cir. 1985).

This arrangement compares favorably to the circumstances considered by the Court in *United States* v. *$8,850*, 461 U.S. 555 (1983). There the property was seized on the basis of probable cause and then retained by the government pending the institution of civil forfeiture proceedings. Here, by contrast, the restraining order that was issued under Section 853(e)(1)(A) did not deprive respondent of the use of his house and apartment pending the outcome of the criminal trial; it only barred him from disposing of them and thereby rendering them unavailable for forfeiture if he was

[34] The Second Circuit has stated that although Fed. R. Crim. P. 7(c)(2) requires the indictment to identify any property for which criminal forfeiture is sought, the proposed forfeiture of assets need not be presented to the grand jury because it is not an element of the offense, but rather an additional penalty for a violation. *United States* v. *Grammatikos*, 633 F.2d 1013, 1025 (2d Cir. 1980). However, we have been informed by the Office of the United States Attorney for the Southern District of New York that the forfeiture allegations in the indictment were presented to the grand jury in this case and that it is that Office's usual practice to do so.

convicted.[35] Moreover, in deciding in *$8,850* whether the filing of the civil forfeiture proceeding 18 months later afforded the claimant a postdeprivation hearing within a reasonable time, the Court applied by analogy the four-part test of *Barker* v. *Wingo*, 407 U.S. 514 (1972), for determining whether delay in criminal cases violates the Speedy Trial Clause, and it found no violation. 461 U.S. at 565-569. In a case of criminal forfeiture, by contrast, the Speedy Trial Clause and the more stringent deadlines of the Speedy Trial Act (18 U.S.C. 3161) apply of their own force to require a prompt disposition of the charges. Cf. *Baker* v. *McCollan*, 443 U.S. 137, 145-146 (1979). In this case, the trial commenced a little more than seven months after the indictment was returned.[36]

The panel in this case was not prepared to regard the indictment as a sufficient basis on which to maintain a pretrial restraining order in effect under subsection (e)(1)(A) where the defendant seeks to use the property to hire a lawyer to defend him against the criminal charges and has no other assets to use for that purpose. In those circumstances, the panel concluded, the restraining order may be kept in effect only if the government demonstrates at an adversarial hearing, by evidence independent of the indictment, a probability of convincing the jury beyond a reasonable doubt both that the defendant has violated the

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[35] Subsection (f) authorizes a court to issue a warrant for the seizure of property if it determines that there is probable cause to believe the property would be subject to forfeiture in the event of conviction and that a restraining order or other action taken under subsection (e) would be inadequate to assure the availability of the property for forfeiture. Thus, the statute provides for a judicial determination of probable cause where the defendant would be dispossessed of the property.

[36] Respondent's concerns (Br. 48-49) about the length of time a restraining order will remain in effect therefore are without constitutional foundation.

statute and that the assets are subject to forfeiture. Pet. App. 67a-68a.

On remand from the panel's decision, the district court conducted a four-day hearing at which the government made a detailed presentation of its case, through the testimony of its case agent and numerous exhibits, including real estate records and evidence found at the house and apartment. Respondent did not put on any evidence to rebut the government's showing. At the conclusion of the hearing, the court continued the restraining order, finding that the government had "overwhelmingly established a likelihood of conviction under sections 848 and 846, and that the restrained properties were obtained with the proceeds of narcotics related activities" (Pet. App. 86a). The necessary effect of that decision was to establish the likelihood not only that the house and property were tainted assets in which respondent could have no legitimate ownership interest or expectation of use for *any* purpose (compare *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-687 (1974)), but also that all right, title and interest in the property had already vested in the United States under Section 853(c) as of the time respondent committed the acts that gave rise to the forfeiture. In light of the showing by the government and finding by the district court, respondent cannot plausibly maintain that it was fundamentally unfair, or an impermissible interference with his qualified right to the assistance of counsel of his choice, for the court to keep the restraining order in effect pending completion of the trial, in order to "preserve the availability of [the] property *** for forfeiture *** in the event of conviction." 21 U.S.C. 853(e)(1) (Supp. IV 1986). *Bell* v. *Wolfish*, 441 U.S. 520, 534 (1979). A restraining order based on such a strong pretrial showing that the property is tainted and in fact belongs to someone other than the defendant does not "arbitrarily" interfere with the defendant's interest in using the assets to hire a

lawyer or deny him a "fair opportunity" to seek the assistance of counsel of his choice. *Powell* v. *Alabama*, 287 U.S. at 53, 69.

Respondent nevertheless contends (Br. 38 & n.21, 41) that a court cannot interfere with the use of the "defendant's assets" by the invoking what he terms the "legal fiction" of the relation-back doctrine, under which legal title to forfeited assets vests in the United States as of the time the defendant committed the acts that gave rise to the forfeiture. In respondent's view (Br. 38), *no* restriction can "deprive the defendant of his common law property rights" and his asserted Sixth Amendment entitlement to utilize those rights to hire a lawyer, until the defendant has been convicted. Respondent ignores the fact that the allegations in the indictment and the pretrial hearing in this case established a strong likelihood, which was subsequently confirmed by the jury's verdict, that the property did *not* rightfully belong to him and that, as the proceeds of transactions in contraband, it constituted property in which Congress could constitutionally abrogate private interests.

Perhaps more significantly, respondent's argument overlooks the direct parallel between the nature of the hearing that was held by the district court on remand from the panel's decision in this case and the nature of the judicial proceedings that are ordinarily conducted to establish the civil forfeiture of property. Under long-settled principles of in rem forfeiture law, if the government establishes probable cause for the seizure of the property, the burden then shifts to the claimant to prove by a preponderance of the evidence that he has a lawful interest in the property and that it is not subject to forfeiture. The government can satisfy its threshold showing of probable cause in such a proceeding through the use of affidavits and other evidence not strictly limited by the Rules of Evidence. See, *e.g.*, *United States* v. *26.075 Acres*, No. 88-6036 (4th Cir. Jan. 31, 1989), slip op. 13; *United States* v. *Premises Known as 526 Liscum Drive*, No. 87-3699 (6th Cir. Jan. 25, 1989), slip op. 5-6 & n.3; *United States* v. *$250,000 in United States Currency*, 808 F.2d 895, 897-900 (1st Cir. 1987); *United States* v. *A Single Family Residence*, 803 F.2d 625, 628 (11th Cir. 1986); *United States* v. *One 56-Foot Motor Yacht Named Tahuna*, 702 F.2d 1276, 1281-1283 (9th Cir. 1983).[37] Respondent's house and apartment were subject to civil forfeiture under these standards. 21 U.S.C. 881(b)(6) and (d); 19 U.S.C. 1615. The government effectively established its title to the property under these standards at the hearing ordered by the panel, because it "overwhelmingly" showed probable cause to believe that the property was subject to forfeiture, and respondent did not rebut that showing. Especially in these circumstances, it was entirely appropriate to retain the restraining order in effect pending the completion of the trial.

There is no occasion here for the Court to consider the correctness of the panel's decision insofar as it held that an adversarial hearing is required in order to maintain a restraining order that has the effect of preventing the defendant from using the restrained assets to hire a lawyer, since the government satisfied the standards prescribed by the panel at such a hearing in any event.[38] Even if some judicial inquiry into the evidence supporting the government's case is appropriate, however, we have serious doubts that the

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[37] These principles date to the earliest years of the Nation. See *Wood* v. *United States*, 41 U.S. (16 Pet.) 342, 366 (1842); *Taylor* v. *United States*, 44 U.S. (3 How.) 197, 211 (1845); Act of July 31, 1789, §27 1 Stat. 29, 43-44.

[38] Other courts have required such a hearing where the defendant seeks access to the assets in order to retain counsel to represent him in the criminal prosecution. See, *e.g.*, *Moya-Gomez*, 860 F.2d at 726-730; *United States* v. *Unit No. 7 & Unit No. 8 of Shop in the Grove Condominium*, 853 F.2d 1445 (8th Cir. 1988). Congress did not intend to foreclose a court from holding a hearing, if necessary, on the question of vacating a restraining order after it has been issued. See S. Rep. 225, *supra*, at 203; cf. Pet. App. 36a-39a (Mahoney, J. dissenting).

Constitution requires an adversarial hearing. A judicial determination of probable cause, based on the government's showing, should be sufficient to restrain the assets, just as it is for a seizure, which more drastically interferes with the defendant's rights. Cf. *Baker* v. *McCollan*, 443 U.S. at 143.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 1989

APPENDIX

STATUTORY PROVISION INVOLVED

Section 853 of Title 21, United States Code (Supp. IV 1986) provides:

Criminal forfeitures

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Meaning of term "property"

Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) Third party transfers

All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d) Rebuttable presumption

There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that—

(1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter.

(e) Protective orders

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II of this chapter for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information

or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(f) Warrant of seizure

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) of the section may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

(g) Execution

Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory

performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

(h) Disposition of property

Following seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

(i) Authority of the Attorney General

With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States, in accordance with the provisions of section 881(e) of this title, of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(j) Applicability of civil forfeiture provisions

Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 881(d) of this title shall apply to a criminal forfeiture under this section.

(k) Bar on intervention

Except as provided in subsection (n) of this section, no party claiming an interest in property subject to forfeiture under this section may—

(1) intevene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(l) Jurisdiction to enter orders

The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject

to forfeiture under this section or which has been ordered forfeited under this section.

(m) Depositions

In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(n) Third party interests

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of

the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(o) Construction

The provisions of this section shall be liberally construed to effectuate its remedial purposes.

(p) Forfeiture of substitute property

If any of the property described in subsection(a) of this section, as a result of any act or omission of the defendant—

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

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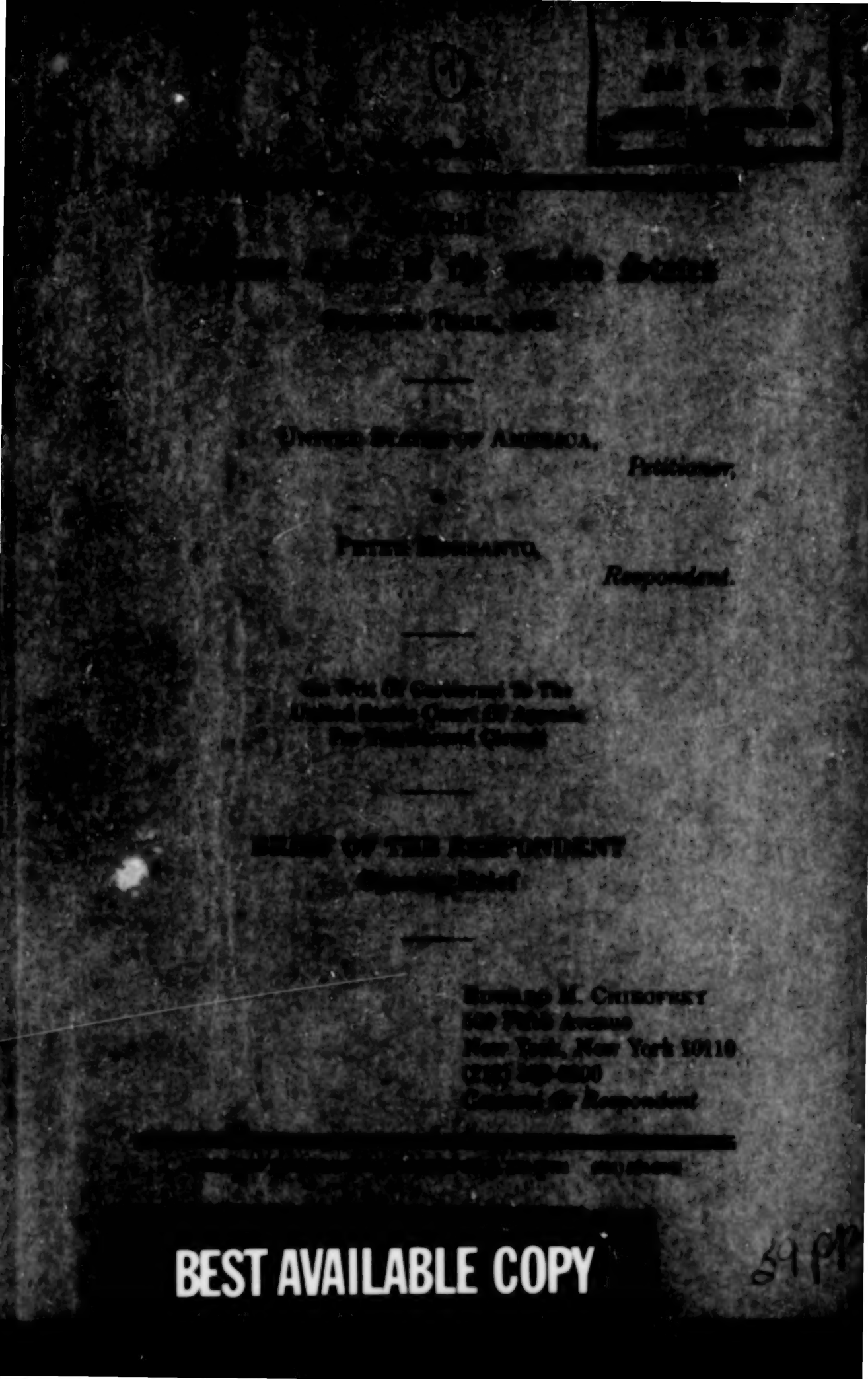
RESPONDENT'S

BRIEF



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QUESTIONS PRESENTED

Any property that is derived from the proceeds of specified offenses under the federal narcotics laws is subject to forfeiture to the United States under 21 U.S.C. § 853(a). Where an indictment includes a forfeiture count, the court is authorized to enter an order restraining the defendant from disposing of the property, in order to preserve its availability for forfeiture. 21 U.S.C. § 853(e)(1)(A). The questions presented are:

1. Whether otherwise forfeitable assets are exempt from forfeiture under Section 853(a) if the defendant wishes to use them to pay an attorney to represent him in the criminal prosecution.

2. Whether, if such assets are not altogether exempt from forfeiture, Section 853(e)(1)(A) authorizes a court to enter a pretrial restraining order that has the effect of preventing the defendant from using covered assets to pay his attorney.

3. Whether, if Sections 853(a) and 853(e)(1)(A) authorize the forfeiture and pretrial restraint of such assets, those provisions are violative of the defendant's Sixth Amendment right to the assistance of counsel of his choice and his Fifth Amendment right to the fairness of the adversary system of justice.

4. Whether, and in what manner, a court may or must hold a hearing on a pretrial restraining order if the order has the effect of barring the defendant from paying attorney's fees.

5. Whether, if the restraining order is lifted and assets are then transferred to an attorney prior to trial, those assets will thereafter be exempt from forfeiture if the defendant is convicted and the assets are found to be the proceeds of illegal activities.

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OPINIONS BELOW

The opinion of the *en banc* court of appeals (Pet. App. 1a-47a)[1] is reported at 852 F.2d 1400. The opinion of the panel of the court of appeals (Pet. App. 48a-76a) is reported at 836 F.2d 74. The district court's restraining order issued on July 9, 1987 (Pet. App. 77a-78a); the district court's August 28, 1987 order denying respondent's motion to vacate or modify the restraining order (Pet. App. 79a); and the district court's January 15, 1988 oral ruling again declining to vacate or modify the restraining order (Pet. App. 80a-88a) are unreported.

JURISDICTION

The judgment of the court of appeals on rehearing *en banc* was entered on July 1, 1988. On August 24, 1988, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including September 14, 1988. The petition was filed on September 14, 1988 and was granted on November 7, 1988. The Court directed that this case be heard *in tandem* with No. 87-1729, *Caplin & Drysdale, Chartered* v. *United States*. Jurisdiction rests on 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of the Fifth and Sixth Amendments to the Constitution of the United States and the relevant statutory provisions of the Comprehensive Forfeiture Act of 1984 —21 U.S.C. § 853—are set out in the petition for certiorari (Pet. 2 and Pet. App. 89a-98a).

STATEMENT

1. Enacted in October 1984 as part of Congress' major overhaul of the federal criminal code—the Comprehensive Crime Control Act of 1984 (Pub. L. No. 98-473, 98 Stat. 1837

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari filed by the government in this case. The government was granted leave to dispense with printing a joint appendix.

(1984))—the provisions of the Comprehensive Forfeiture Act (CFA) (98 Stat. 2040), applicable both to the Racketeer Influenced and Corrupt Organizations (RICO) Act and the federal narcotics statutes, provide that, where designated property is specified in the indictment for forfeiture, defendants convicted under these provisions must surrender to the United States their interest in, and control of, any designated proceeds listed in the indictment from their ill-gotten gains.[2]

In amending the RICO and CCE statutes, Congress also authorized certain provisional remedies. Both statutes now provide that upon *ex parte* application by the government, a district court may enter a pretrial restraining order or injunction to "preserve the availability of property . . . for forfeiture." 21 U.S.C. § 853(e)(1).[3] Thus, based solely upon the as-

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[2] The forfeiture sections of the CFA, relating to the RICO and narcotics statutes, are, for all intents and purposes, identical in their substantive provisions. *Compare* 18 U.S.C. § 1963 *with* 21 U.S.C. § 853. Accordingly, all further references to the provisions under the narcotics statute will be deemed to apply to RICO cases as well.

For thorough discussions of the amended forfeiture statutes, their legislative history [S. Rep. No. 98-225, at 191 *et seq.*, commencing at 1984 U.S. Code Cong. and Admin. News at 3374 *passim*], earlier proposed Congressional bills, and judicial interpretations of the amended statutes, *see, e.g.*, Cloud, *Forfeiting Defense Attorneys' Fees: Applying An Institutional Role Theory To Define Individual Constitutional Rights*, 1987 Wisc. L. Rev. 1, 15-32; Note, *Against Forfeiture of Attorneys' Fees Under RICO: Protecting the Constitutional Rights of Criminal Defendants*, 61 N.Y.U. L. Rev. 124, 127-133 (1986); Note, *Forfeiture of Attorneys' Fees: Should Defendants Be Allowed To Retain "The Rolls Royce of Attorneys" With "The Fruits Of The Crime?"*, 39 Stanford L. Rev. 663, 664-71 (1987); Note, *Attorney's Fee Forfeiture and Subpoenaing Defendant's Attorneys*, 1986 Annual Survey of Amer. Law 335, 336-349. *Cf.* Brickey, *Forfeiture of Attorney's Fees: The Impact of RICO and CCE Forfeitures On The Right to Counsel*, 72 Va. L. Rev. 493, 497-505 (1986).

[3] Significantly, the government may seek a restraining order not merely at the time of indictment but, in some instances, even prior to indictment. 21 U.S.C. § 853(e)(1)(B). Furthermore, the government has taken the position that the statute permits it to recoup attorneys' fees paid prior to the verdict in the event of a conviction and an order of forfeiture. *See Department of Justice Guidelines on Forfeiture of Attorneys' Fees*, 38 Crim. L. Rptr. (BNA) 3001 (October 2, 1985).

yet unproven forfeiture allegations contained in the indictment (or, as noted *supra*, at n. 4, even *prior* to indictment), the government may seek to freeze or restrain the disposition of some or, depending upon the breadth and generality of its forfeiture allegations, all of a defendant's assets prior to trial.[4]

2. On July 8, 1987, respondent, along with 18 others, was charged in an unsealed indictment in the Southern District of New York with various violations of the federal narcotics and racketeering laws (C.A. *en banc* App. 5-38). The first two counts of the indictment charged respondent with conducting and participating in the affairs of a racketeering enterprise through a pattern of racketeering activity, and conspiring to commit those offenses, in violation of the RICO statute, 18 U.S.C. §§ 1962(c) and (d). Counts three and four charged respondent with conspiring to distribute narcotics and engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. §§ 846 and 848. Counts twelve through fourteen sought forfeiture of three items of property it was charged that respondent had obtained as a result of his alleged illegal activities: (i) respondent's home in Mount Vernon, New York, valued at approximately $335,000; (ii) a cooperative apartment in The Bronx, valued at approximately $30,000; and (iii) $35,000 in cash. Forfeiture was sought under 21 U.S.C. § 853, which provides for the forfeiture of assets, *inter alia*, derived from the proceeds of narcotics violations. On the date that the

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[4] Not only can the government secure pretrial restraint of a defendant's assets based exclusively upon the forfeiture allegations contained in the indictment, as was done in this case (Pet. App. 77a-78a), but it may do so even without the grand jury's formally passing on the propriety of the assets inclusion in the forfeiture count. Such a "charge" in the indictment is deemed merely an additional punishment provision, not an element of the substantive offense. *See United States* v. *Grammatikos*, 633 F.2d 1013, 1025 (2d Cir. 1980) (the "grand jury [need not] pass upon the susceptibility of property subject to" forfeiture); *compare* Reed, *Criminal Forfeiture Under the Comprehensive Forfeiture Act of 1984: Raising the Stakes*, 22 Am. Crim. L. Rev. 747, 763 n. 98 (1985) ("district courts[']. . . conclusive reliance on a prior grand jury finding that particular assets are forfeitable and thereby subject to pretrial restraint" wholly misconceived where grand jury has not, in fact, made the requisite probable cause determination).

indictment was unsealed, the district court granted the government's *ex parte* motion for an order restraining respondent from selling or transferring the Mount Vernon residence or the Bronx apartment, pursuant to 21 U.S.C. § 853(e)(1)(A) (Pet. App. 77a-78a).

On July 31, 1987, a Boston criminal defense attorney who had consulted with respondent with a view toward representing him attended the first pretrial conference in this matter, but declined to enter a formal appearance on respondent's behalf (Pet. App. 50a). At a later conference on August 6, 1987, a New York attorney entered a limited appearance on respondent's behalf for the purpose of litigating a challenge to the restraining order and forfeiture provision under which respondent's assets were frozen, insofar as they prevented him from utilizing the restrained assets to retain counsel (*id.*). The district court was informed that the government's refusal to modify the restraining order and the threat of post-trial forfeiture of attorneys' fees was specifically what had deterred Boston counsel from representing respondent. The district court thereupon stated its position that invasion of the forfeitable assets might be allowed to pay attorneys' fees for respondent's counsel of choice, but only to the limited extent of expenditures permissible under the Criminal Justice Act ("CJA"), 18 U.S.C. § 3006A. (*id.* at 51a).

On August 28, 1987, the district court held a hearing on respondent's *pro tem* counsel's motion to vacate or modify the restraining order by (a) permitting respondent to use a portion of the restrained assets to retain private counsel, and (b) exempting legal fees paid to that counsel from post-trial forfeiture. (Pet. App. 51a). Informed that respondent had contacted several potential private trial counsel and that none was willing to represent him for the CJA-level compensation previously proposed by the court, the district court acknowledged that respondent was, in fact, rendered *de facto* indigent by the

previously-entered restraining order (*id.*).[5] Nonetheless, the court refused to modify its previous position that CJA-level compensation was all that would be provided to private counsel (*id.*) Accordingly, the district court denied respondent's motion for modification or vacatur of the restraining order insofar as it prevented the disbursement of funds for legitimate (that is, non-sham) attorneys' fees. (*id.* at 51a, 79a, although *cf.* 4a). The district court thereupon appointed CJA-counsel to represent respondent. (Pet. 5 n.5).

3. On expedited appeal, a divided panel of the court of appeals reversed and remanded for further proceedings (Mahoney and Cardamone, JJ.) (Oakes, J., dissenting) (Pet. App. 48a-76a).

(a) The panel majority rejected respondent's statutory contentions that 21 U.S.C. § 853 was not intended by Congress to prohibit the payment of legitimate attorneys' fees out of seized assets subject to pretrial restraint, so long as the payment was for *bona fide* proposes, and was not a fraudulent or sham transaction (Pet. App. 55a-60a). The panel majority reasoned that "the plain language of the statute . . . contains no exception for attorneys' fees . . ." (*id.* at 56a) and that the legislative history of the statute, while admittedly ambiguous on the question, was "certainly not clear enough to warrant depar-

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[5] *See, e.g., United States* v. *Badalamenti*, 614 F.Supp. 194, 196 (S.D.N.Y. 1985) ("By the Sixth Amendment we guarantee defendant the right to counsel, but by the forfeiture provisions of the RICO and CCE statutes (if they apply to the fee of the defense attorney), we insure that no lawyer will accept the business"). Indeed, respondent's fruitless quest for private counsel in this forfeiture context is no mere anomaly, but is supported by hard empirical data. Note, 61 N.Y.U. L. Rev. at 134 n.53 (Genego Study); Committee on Criminal Advocacy, *The Forfeiture of Attorney Fees in Criminal Cases: A Call For Immediate Remedial Action*, 41 The Record of the Association of the Bar of the City of New York 469, 478-79 (May 1986). *See also* Genego, *The New Adversary*, 45 Brklyn L. Rev. 1, 25-40 (1988); Genego, *The Legal and Practical Implications Of Forfeiture Of Attorneys' Fees*, 36 Emory L.J. 837 (1987).

ture from the plain meaning of the statute" (*id.* at 59a).[6] The panel majority also rejected respondent's contentions that such a narrow statutory interpretation violated the Fifth Amendment right to due process and the Sixth Amendment right to counsel insofar as it authorized pretrial restraint and post-trial forfeiture of assets that a defendant intends to utilize to retain counsel of choice and gave the government an "unwholesome" power within the adversary system to effectively render a defendant *de facto* indigent prior to trial and to deprive him wholly of the right to private counsel, including counsel who previously may have been representing him (*id.* at 60a-72a).

Nonetheless, the panel majority conceded that respondent was denied procedural due process by a statutory scheme that permitted the *ex parte* seizure of a defendant's assets without providing some form of pretrial post-seizure hearing by which to test the propriety of the pretrial restraint (Pet. App. 64a). Without such a hearing, the panel found, the government would be allowed to impose indigence and deprive RICO and CCE defendants of the opportunity to retain private counsel merely by obtaining an indictment, thereby giving it "the ultimate tactical advantage of being able to exclude competent counsel as it chooses" simply by "appending a charge of forfeiture to an indictment under RICO or CCE" (*id.* at 64a, *citing United States* v. *Rogers*, 602 F.Supp. at 1350). Accordingly, the panel majority directed that a pretrial post-seizure hearing be held, but that the government need prove only two elements to sustain its pretrial restraint—(a) its likelihood of proving defendant' guilty beyond reasonable doubt and (b) its likelihood of proving that the assets in question were subject to forfeiture (*id.* at 67a). Moreover, the panel majority ruled that the Federal Rules of Evidence were not applicable to such a hearing, nor were the customary injunctive "balancing" tests traditionally utilized under Rule 65 of the Federal Rules of Civil Procedure; "only the government's likelihood of success in convicting the defendant and obtaining forfeiture of the disputed assets will be at issue" (*id.* at 71a).[7] The panel remanded the case for the contemplated pretrial hearing.

(b) Judge Oakes dissented from the panel majority (Pet. App. 72a-76a). While agreeing that an exemption of legitimate attorneys' fees from the forfeiture provisions of the RICO and CCE statutes "improperly contorts the plain language of the statute" (*id.* at 72a), Judge Oakes nonetheless held that the majority's denigration of defendant's interest in using even possibly tainted assets to retain counsel to defend him in pending criminal proceedings "permits deference to congressional policy in the face of conflicting constitutional rights" (*id.*). Finding the forfeiture statute "unconstitutional at least on Sixth

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[6] In so ruling, the panel majority rejected the holdings of numerous earlier cases that these provisions—as applied to legitimately-contracted attorneys' fees—either (i) were not within the contemplation of Congress when it enacted these forfeiture provisions in 1984 or (ii) were (a) an unconstitutional violation of defendant's Sixth Amendment rights to retain counsel of choice and to secure effective assistance of counsel as well as (b) an unconstitutional interference with the fairness of the adversary system as guaranteed by the Fifth Amendment's Due Process clause. *Compare, e.g., United States* v. *Harvey*, 814 F.2d 905 (4th Cir. 1987), *rev'd sub nom. In Re Caplin & Drysdale*, 837 F.2d 637 (4th Cir. 1988) (*en banc*); *United States* v. *Thier*, 801 F.2d 1463, 1475 (5th Cir. 1986) (Rubin, J., concurring), *modified*, 809 F.2d 249 (5th Cir. 1987); *United States* v. *Nichols*, 654 F.Supp. 1541 (D.Utah 1987) *rev'd*, 841 F.2d 1485 (10th Cir. 1988); *United States* v. *Ianniello*, 644 F.Supp. 452 (S.D.N.Y. 1985); *United States* v. *Bassett*, 632 F.2d 1308 (D. Md. 1986) and *United States* v. *Reckmeyer*, 631 F.Supp. 1191 (E.D. Va. 1986), *aff'd on other grounds sub nom. Harvey, supra, rev'd sub nom. In Re Caplin & Drysdale, supra; United States* v. *Badalamenti*, 614 F.Supp. 194 (S.D.N.Y. 1985); *United States* v. *Rogers*, 602 F.Supp. 1332 (D. Colo. 1985).

[7] The panel majority explicitly rejected the distinction promulgated by virtually every other court and commentator which had previously considered the question (*see* nn. 2 & 6, *supra*)—*viz.* whether the funds sought to be exempted from the restrained assets, irrespective of their potential forfeiture upon conviction, were sought to be paid to counsel as legitimate attorneys' fees or were a "sham" or "fraud" transaction to avoid forfeiture. Indeed, the panel majority not only rejected the "sham-fraud" standard of the *Harvey* panel, 814 F.2d at 924, and its predecessor cases, (*e.g., Ianniello, Bassett, Reckmeyer, Badalamenti* and *Rogers*), it also rejected *sub silentio* the balancing test promulgated by the Fifth Circuit in *Thier*, 801 F.2d at 1471, 1474 ("[T]he defendant's interest in obtaining counsel of choice and the possible adverse effects of a pretrial refused to exempt defense counsel's fees from forfeiture are factors that the district court must consider . . .").

Amendment, and possibly on Fifth Amendment due process grounds" (*id.* at 75a), Judge Oakes held that a defendant's constitutional rights were implicated "not only on the individual level of a particular defendant, but also on the institutional level of the criminal justice system as a whole" (*id.* at 72a). Chiding the panel majority for failure to credit the institutional interest in a fair adversary system by providing the government with an "unwholesome" power over the defendant's choice of counsel (*id.* at 73a-74a) and criticizing the two-pronged procedural test jerry-built by them (*id.* at 74a-75a), Judge Oakes concluded that the statute intruded not only on the individual's right to secure counsel of choice, but also "shakes the very foundations of our criminal justice system" (*id.* at 76a).

4. Pursuant to the panel's mandate, the district court on remand conducted a post-seizure hearing (Pet. App. 80a-88a), and, on January 15, 1988, once again denied respondent's motion to vacate or modify the restraining order (*id.*). Trial was scheduled to commence on February 15, 1988, with respondent to be represented by CJA-appointed counsel. In the interim—and prior to the commencement of trial—the Court of Appeals granted rehearing *en banc* on January 29, 1988. Motions to sever the defendant or stay commencement of trial pending *en banc* review were denied.

5. On July 1, 1988—during the course of the trial—the Court of Appeals rendered its decision on rehearing *en banc*. (Pet. App. 1a-47a). It vacated the decision of the district court (and the panel majority) and directed that the preconviction restraining order be modified to allow respondent access to the restrained assets to the extent necessary to pay "legitimate (that is, non-sham) attorneys' fees" in connection with representation on the criminal charges against him (*id.* at 4a). The court further held any such fees paid to counsel exempt from subsequent recoupment even in the event of defendant's ultimate conviction and judgment of forfeiture of the restrained assets (*id.*)

(a) Chief Judge Feinberg, in a concurrence joined by Judges Oakes and Kearse, held that the statutory forfeiture

provisions preventing the disbursement of restrained assets—to the extent that they are to be paid for the retention of counsel—violated the Sixth Amendment (Pet. App. 4a-8a). Finding the governmental interests provided by the statute insufficiently compelling to overcome a defendant's constitutional right to counsel of choice, Chief Judge Feinberg held that—given the "conditional" nature of the government's claim to the assets (which is not ultimately resolved until verdict)—the defendant's constitutional rights must be accorded primacy (*id.* at 4a-8a). Chief Judge Feinberg also found that the restraint on the right to counsel imposed in these circumstances affected other liberty interests of the defendant as well and that the restriction imposed on defendant's right to counsel of choice was not a mere limitation on its exercise but a total abridgement of it (*id.* at 5a-7a). Chief Judge Feinberg noted, however, that the court's holding did not otherwise deprive the government of its right to pretrial restraint of a defendant's assets. Rather, it frees assets "only when they are used to pay legitimate attorneys' fees and when no other assets are available." (*id.* at 5a-6a).

(b) Judge Oakes, in a separate concurrence, reiterated his panel dissent, holding additionally that the Fifth Amendment due process clause is also implicated both because the statute "puts too much power in the hands of the prosecution to determine who will *not* be defense counsel . . . particularly . . . in . . . long complicated RICO and CCE cases" where the present system of providing counsel for the indigent may not provide effective representation and because the pretrial restraint imposed smacks too closely of the Alice-in-Wonderland "sentence first, verdict afterward" model of justice (Pet. App. 8a-10a).

(c) Judge Winter, in a concurrence joined by Judges Meskill and Newman, joined the result of the majority, but felt it unnecessary to reach the constitutional question. Rather, he believed that the same result was compelled as a matter of statutory construction (Pet. App. 10a-23a). Observing that the

statute was drafted in permissive "may", rather than mandatory "shall", terms, and noting the absence of congressional intent to the contrary (*id.* at 11a, 19a), Judge Winter held that in balancing the relative hardship of the parties, equitable principles compel the dispensation of funds—allegedly tainted or otherwise—for purposes of counsel fees and life's necessaries (*id.* at 11a-20a). Nonetheless, Judge Winter noted that all such expenditures—while compelled—would be conducted under court supervision, thereby preventing the gratuitous dissipation of assets during the pendency of judicial proceedings (*id.* at 14a, 18a). This was particularly compelling, Judge Winter found, because the preconviction restraint on ordinary lawful expenditures is a punishment and the balance of hardships tips decidedly in the accused's favor (*id.* at 18a-19a).

(d) Judge Miner, in a concurrence joined by Judge Altimari, held that the forfeiture statute is constitutionally defective in failing to provide for a hearing even after the issuance of a restraining order and that the hearing procedure created by the panel majority is beyond the power of the judiciary to create (Pet. App. 24a-26a). Rather, relying on such cases as *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), Judge Miner held that such matters should be left to Congress after a finding of unconstitutionality.

(e) Judges Mahoney, Pierce, Cardamone and Pratt dissented (Pet. App. 26a-41a; 41a-42a; 42a-44a; 44a-47a), largely for the reasons stated in the panel majority opinion and Judge Mahoney's *en banc* dissent.

6. On July 5, 1988, immediately after the Court of Appeals *en banc* decision, respondent moved for a mistrial in his still-pending criminal trial based upon the Court of Appeals ruling that he had been deprived of his right to retain private counsel out of the assets restrained by the government (Tr. 14224-44). The district court denied his motion, offering him instead the opportunity to retain counsel in the midst of summations—an option even the district court conceded was unrealistic (Tr. 14242). Accordingly, trial proceeded with assigned counsel,

and respondent ultimately was convicted, and his assets deemed forfeited, on July 25, 1988. (Pet. 14).

SUMMARY OF ARGUMENT

The CFA amended the criminal forfeiture provisions of the RICO and narcotics statutes by providing, for the first time, that the government had equitable remedies at its disposal by which it could now seize and restrain *ex parte* a defendant's assets and property at—or even prior to—the time of his indictment. Prosecutors, accordingly, have begun to utilize the statute to restrain potentially forfeitable assets immediately at the commencement of adversary proceedings. More to the point, they have sought to prevent defendants' use of these assets to allow them to retain private counsel to represent them in connection with the underlying criminal charges brought against them.

It was not Congress' intention to include attorneys' fees within the ambit of "property" subject to forfeiture. The only transactions that the statutes seek to prevent are those that are "shams" or "frauds" aimed at dissipating a defendant's assets prior to conviction. Indeed, close scrutiny of the legislative history indicates that Congress never even considered the possibility of applying the forfeiture statutes to legitimate attorneys' fees that were not fraud or sham transaction aimed at circumventing the forfeiture provisions of the CFA.

Careful review of the relevant statutes, the applicable legislative history and the appropriate balancing of the fundamental constitutional principles at stake demonstrates that neither the forfeiture statutes nor the Constitution permit the government to forfeit legitimate legal fees paid to a lawyer in return for representation of a defendant in a RICO or a narcotics prosecution. First, payment of legal fees is not the type of third-party fraudulent transfer that § 853 intended to combat. Second, if legal fees can be forfeited under the CFA, the statutes must then be declared unconstitutional because they

violate defendant's Fifth and Sixth Amendment rights to due process, counsel of choice and effective assistance of counsel.

Finally, this Court should construe the statute to meet the threat to the adversary system that is posed by the growing menace of governmental forfeiture of counsel fees. Such a practice, with its extraordinarily mischievous potential for manipulation and abuse by the government, clearly would fatally skew the balance of forces that the adversary system contemplates and would violate not only the Sixth Amendment, but the Fifth Amendment, as well.

ARGUMENT

I. CONGRESS DID NOT CONTEMPLATE THE INCLUSION OF ATTORNEYS' FEES WHEN IT ENACTED THE RELEVANT FORFEITURE PROVISIONS OF THE RICO AND CCE STATUTES

The Comprehensive Forfeiture Act of 1984 amended the existing *in personam* forfeiture provisions of the RICO and CCE statutes and also extended *in personam* forfeiture to all felony narcotics cases. These forfeiture provisions provide that title to property subject to forfeiture vests in the United States as of the time the offense is committed (21 U.S.C. § 853(c)).

Subsection 853(c)—commonly referred to as the "relation-back" doctrine—is a codification of the common law "taint" doctrine used in *in rem* forfeiture proceedings where, in theory, the property itself is the defendant and is deemed forfeited as of the commission of the illegal act. *See Simmons* v. *United States*, 541 F.2d 1351, 1352 (9th Cir. 1976). Congress added the relation-back provisions in 1984 to "close a potential loophole" and thereby ensure that assets transferred by the defendant prior to his conviction would not extinguish the government's claim in an *in personam* forfeiture proceeding.

Congress was careful, however, to void only certain pre-conviction transfers by specifically providing that the "relation-back" doctrine does not apply when a third party transferee establishes, pursuant to subsection 853(n), that "he is a

bona fide purchaser for value of such property who at the time of the purchase was *reasonably without cause to believe* that the property was subject to forfeiture under this section" § 853(c) (emphasis added). Section 853(n)(6), thus, provides that after a defendant is convicted, a third party may file a petition asserting a "legal interest" in property ordered forfeited. This property may be exempted from forfeiture if the respondent demonstrates by a preponderance of the evidence that either the claimant has right, title or interest superior to that of the defendant as of the time of the acts giving rise to forfeiture or that he is a *bona fide* purchaser reasonably without cause to believe that the property was subject to forfeiture.

Turning to the legislative history, the purpose of the criminal forfeiture provisions is straightforward—to strip racketeers and drug dealers of their "economic bases" *after conviction*. *See* S. Rep. No. 98-225 at 191. *See also Russello* v. *United States*, 464 U.S. 16, 20 (1983) (purpose of forfeiture provisions is to separate racketeer from his dishonest gains). The "relation-back" doctrine and temporary restraining order provisions are designed to ensure that defendants do not evade forfeiture through pre-conviction transfers.

The legislative history makes plain that the pre-conviction transfers sought to be prevented or voided were those to parties who were not dealing at "arm's length" with the defendant —in other words, "sham" transactions. As the Senate Report explained the "relation-back" amendments:

> The purpose of this provision is to permit the voiding of certain pre-conviction transfers and so close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not "arm's length" transactions. On the other hand, this provision should not operate to the detriment of innocent *bona fide* purchasers of the defendant's property.

S. Rep. No. 98-225 at 200-01. Elsewhere, the Senate Report states of the third-party provision: "The provision should be construed to deny relief to third parties acting as nominees of

the defendant or who have knowingly engaged in sham or fraudulent transactions." *Id.* at 209 n.47. The legislative history thus reveals that Congress' objective in adopting the "relation-back" provisions was "setting out clear authority for voiding improper pre-conviction transfers of assets subject to criminal forfeiture." S. Rep. No. 98-225 at 197. As to what constitutes an "improper transfer," the legislative history refers only to transfers not at "arm's length" terms or where the transferee is actually serving as the defendant's nominee. *See id.* at 209.

Significantly, however, the question precisely before this Court—whether attorneys' fees were intended to be included by Congress within the ambit of forfeitable property under the provisions of the CFA—is a question that Congress *simply never directly addressed*. The relevant statutes are silent on the question and, other than one footnote in an earlier House bill, there was no other debate or discussion of the question before Congress at the time the CFA was drafted and passed.[8]

[8] In discussing an earlier draft of the 1984 amendments to the parallel *in personam* forfeiture provisions of the drug enforcement statute, 21 U.S.C. § 841 *et seq.*, the House Judiciary Committee stated explicitly that "[n]othing in this section [dealing with *in personam* forfeiture] is intended to interfere with a person's Sixth Amendment right to counsel. The Committee does not therefore resolve the conflict in district court opinions on the use of restraining orders that impinge on a person's right to retain counsel in a criminal case. (citation omitted)" H.R. Rep. No. 845, Part 1, 98th Cong., 2d Sess., Rep. of the Committee on the Judiciary concerning the Comprehensive Drug Penalty Act of 1984, p.19 n.1. *See Cloud, 1987 Wisc. L. Rev. at 27 n.133.*

While the *Monsanto* panel majority opined that this sentence "belies any intention to establish a statutory rule concerning forfeiture of attorneys' fees" (Pet. App. 58a), properly read, the House Committee's comment supports the contention that Congress did not contemplate application of the forfeiture statute to legitimate attorneys' fees. In view of the clear disclaimer in the first sentence that the statute not be read "to interfere with a persons' Sixth Amendment right to counsel," it would be unnecessary to resolve the conflict in the district courts concerning the constitutionality of the statute because Congress did not contemplate that the statute would be applied in this way, *i.e.*, Congress expected the statute to be applied only to sham fees. To apply it to legitimate fees would at least potentially interfere with the right to counsel, which Congress stated it did not intend to do. *See* Winick, *Forfeiture of Attorneys' Fees Under RICO and CCE and the Sixth Amendment Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It*, 43 U. Miami L. Rev. ____, Mss. 82-83 & nn. 276-278 (March 1989) (forthcoming) (second sentence of House Report not intended to leave the question to the courts, but rather suggests that in light of Congressional intent not to interfere with Sixth Amendment, contrary decisions were academic).

In this context, it is instructive to compare the House's earlier footnote with the legislative history to the analogous forfeiture provision of the subsequently enacted Onmibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, 100 Stat. 853 (1986), H.R. Rep. No. 99-494, 99th Cong., 1st Sess., Foreign Affairs Committee, p. 90, 1986 U.S. Code Cong. & Admin. News 1963 ("Nothing in these provisions is intended to interfere with a person's Sixth Amendment *right to counsel of choice* or to the effective assistance of counsel") (emphasis added).

The new provision, enacted in 1986 after numerous courts had grappled with the meaning of the earlier footnote, makes explicit Congress' intention not to interfere with defendant's ability to secure counsel of choice even where the assets contemplated for such retention may be potentially forfeitable property.

Several members of Congress, however, in hearings subsequent to the passage of the CFA, have gone on record as stating that it was never Congress' intent for the Department of Justice to apply the property forfeiture provisions to attorneys' fees. Senator Patrick Leahy (D.-Vt.), a member of the Senate Judiciary Committee and a co-sponsor of the CFA, recently remarked:

> During the entire debate in Congress, there was never any discussion of using these statutes as the government is using them now [to forfeit attorneys' fees]. In fact, if there had been any suggestion that they be used that way, the bill never would have passed.

quoted in 1986 Annual Survey of Amer. Law at 341 n. 43.[9]

[9] *See also* Current Problems of Money Laundering, Hearings Before Subcommittee on Crime, H.R., 99th Cong., 1st Sess., Sept. 12, 1985, at 363 (remarks of Rep. Hughes):

> I just want to say, in reference to your last comment, I share your concern about the Justice Department's interpretation of the forfeiture law. You know, the forfeiture law came out of this subcommittee, and we worked on it for about four years. It was never our intent, in fact, to trample upon Sixth Amendment rights, and I share your concern. We'll take a look at that, because it appears that the Justice Department, in fact, is interpreting it and implementing the forfeiture statute contrary to the intent of the subcommittee.

See also Forfeiture Issues, Hearings Before Subcommittee on Crime, H.R.,

Obviously, then, serious questions exist as to Congressional intent when it passed the CFA. Given the breadth and generality of the statutory language and the silence of the legislative history, serious constitutional overtones are raised by the interpretations posited by those courts which have held that no exemption should be read into the statute governing legitimate attorneys' fees where the plain language of the statute fails to provide for one. *See, e.g, United States* v. *Nichols*, 841 F.2d 1485 (10th Cir. 1988); *In Re Caplin & Drysdale*, 837 F.2d 637 (4th Cir. 1988). Such a blindered interpretation—that absent an explicit exemption in the language of the forfeiture statutes, *bona fide* attorneys' fees are forfeitable—plainly runs afoul of statutory and constitutional prescriptions.

As the statutory and legislative history make clear, Congress, in enacting the 1984 amendments, expressed its intention to close a loophole in the previous criminal forfeiture scheme that had allowed defendants to evade forfeiture by means of third party transfers prior to conviction. The early district court opinions construing the statutes not to reach legitimate attorneys' fees concluded that Congress intended the forfeiture provisions to reach only fraudulent third-party transfers, such as "sham" attorneys' fees. *Ianniello*, 644 F.2d at 455-58; *Bassett*, 632 F.2d at 1316; *Reckmeyer*, 631 F.2d at 1196; *Badalamenti;* 614 F. Supp. at 196; *Rogers*, 602 F.Supp. at 1348.[10]

99th Cong., 1st Sess., Sept. 25, 1985, at 233 (remarks of Rep. Shaw):

> Admittedly, this section did not contemplate the forfeiture of attorneys' fees. I cannot remember one instance when we were discussing this law in hearings where the question even really came up so I think that it is fair to say that all of us on this subcommittee or even on the full Judiciary Committee were somewhat surprised by the results.

[10] While subsequent judicial interpretations of the statutes and legislative history have come to conclusions at variance with those reached in these early district court decisions as applied to attorneys' fees—*see, e.g., Harvey, Caplin & Drysdale*, and *Nichols*—their rationales have generally turned on the "silence" of the statutes as regards attorneys' fees and the "ambiguity" of the legislative history on this issue. As noted in Point II, *infra*, those later decisions generally have analyzed the problem through the wrong end of the telescope. Given the serious constitutional ramifications entailed in depriving defendants of their Sixth Amendment rights, the failure of the statutes and legislative history to evidence an affirmative intention to subject legitimate attorneys' fees to forfeiture is dispositive, not Congress' failure to create an exemption therefor. *See* Point II, *infra*.

Citing that portion of the legislative history which refers to Congress' intent to void pre-conviction transfers that were not at "arm's length" while not operating to the detriment of innocent bona fide purchasers (S. Rep. No. 98-225 at 200-1), Professor Cloud concluded (1987 Wisc. L. Rev. at 27-28):

> "Congress intended different treatment of assets transferred to third parties and assets in the hands of the defendant." (citation omitted). The latter are forfeitable if they consist of the proceeds of relevant crimes. But something more is required by the statutes before the property interests of third parties can be nullified under the criminal forfeiture statutes.
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> * * *
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> The nature of the transaction—whether it is *bona fide* or illegitimate—determines the forfeitability of third party assets. Legitimate arms' length transactions are exempt, including bona fide payments of lawyers' fees.

Clearly, then, legitimate fees paid to an attorney for the defense of a criminal case are not the type of non-arm's length, sham transactions at which §§ 853 is aimed. Accordingly, they do not fall within the ambit of the statute. *See Rogers* 602 F.Supp. at 1348 ("An attorney who receives funds in return for services legitimately rendered operates at arm's length and not as part of an artifice or sham to avoid forfeiture. Like the grocer compensated for the food he sells to the defendant or the doctor paid a fee for healing the defendant's children, the lawyer is entitled to compensation for his services actually and legitimately rendered.").

II. THE COURT CAN NARROWLY CONSTRUE THE STATUTORY QUESTION BY EXCLUDING ATTORNEY'S FEES UNDER THE CFA IN THE ABSENCE OF A CLEARLY EXPRESSED CONGRESSIONAL INTENT TO INCLUDE THEM WITHIN THE AMBIT OF "PROPERTY" SUBJECT TO FORFEITURE

As noted above, the statutes and legislative history of the CFA are silent on the question of whether attorneys' fees were intended to be included or exempt from the "property" subject to forfeiture. The overwhelming majority of the early district court cases to construe the statute, noting the paucity of commentary within the legislative history, uniformly concluded that, given the closeness of the constitutional issue involved and the silence of Congress on the question (except for one footnote in a House Report), the appropriate course was effectively to read a Sixth Amendment exemption into the statute. *See, e.g., Ianniello, supra; Bassett, supra; Reckmeyer, supra; Badalamenti, supra; Rogers, supra.*

It is well established that if Congress intends an interpretation of a statute which is in derogation of a previous common law or statutory right, it must speak with special clarity. *See* Note, 61 N.Y.U. L. Rev. at 149-50 & n.146. This principle, known as "the policy of clear statement" (H. M. Hart & A. Sacks, *The Legal Process* 1240 (tent. ed. 1958); A. Bickel, *The Least Dangerous Branch* 156-69 (1962)), applies *a fortiori* where the right impinged upon is of constitutional dimension.

Thus, we must ask whether the general statutory language of the CFA supports such a broad assertion of prosecutorial discretion, infringing so heavily on individual liberties and altering so dramatically the nature of our adversary system, where there is no indication in the legislative history to indicate that Congress intended so unprecedented a result. In other contexts, when a legislative or regulatory agency purports to have authority to infringe upon fundamental rights, courts have insisted upon an explicit legislative expression of that authority. *E.g., Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S.

265, 308-09 (1973) (opinion of Powell, J.); *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 105-14 (1976); *Kent* v. *Dulles*, 357 U.S. 116, 129 (1958).

Application of the forfeiture statutes to legitimate attorneys' fees raises, at the very least, extremely serious constitutional questions. *See* Point III, *infra*. However, the Court has various interpretive principles at its disposal by which to defer judicial imposition of constitutional constraints on Congress' ability to deal with difficult questions of social policy, which it had not previously considered.[11] These canons reflect "the prudential concern that constitutional issues not be needlessly confronted." *DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 108 S. Ct. 1392, 1397 (1988); *Ashwander* v. *T.V.A.*, 297 U.S. 288, 341-56 (1936) (Brandeis, J., concurring).

Several canons warrant the Court's consideration here—(a) the canon of statutory construction that counsels that an act should not be construed to violate the Constitution if a constitutional interpretation is possible (*see, e.g., N.L.R.B.* v. *Cath-*

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[11] Even the *Caplin & Drysdale* court virtually acknowledged that Congress had not thought sufficiently about the troubling questions raised by application of the 1984 forfeiture statute to attorneys' fees. 837 F.2d at 648-49. Although the Court noted that the issue "does indeed raise many complex problems" (*id.*) and that "[t]he interests on each side of the controversy are weighty and profound" (*id.*), the Court was of the view that, despite the constitutional questions raised directly, "Congress in the first instance is the proper body to deal with these issues" (*id.*) and "that this is not a debate that should be silenced by judicial fiat." (*id.*).

This failure of Congress even to consider the issue also was conceded by the Tenth Circuit in *United States* v. *Nichols*, 841 F.2d at 1496 n.6, which, after an independent "review of the hearings and the rest of the legislative history," could find "only a few oblique references to payments of attorneys," and concluded that "[n]one of these passages indicate that Congress specifically considered whether payments made to attorneys should be subject to forfeiture."

Indeed, given the subsequent statements made by various legislators with respect to the passage of the bill (*e.g.*, Senator Patrick Leahy, one of the CFA's sponsors before the Senate Judiciary Committee) (and other legislators cited in n.9, *supra*) and doubts are trebled as to whether Congress intended (or even considered) so broad an infringement on individual liberties and the adversary system.

olic Bishop of Chicago, 440 U.S. 490 (1979)); and (b) a method drawn from administrative law that closely scrutinizes broad delegations of authority to administrative officials when such discretionary authority intrudes on fundamental constitutional values (*see, e.g., Kent* v. *Dulles*, 357 U.S. 116 (1958)). *See* Winick, 43 U. Miami L. Rev. ____, Mss. 71-104.

A. Narrow Statutory Construction In The Absence Of Affirmative Congressional Intent

This Court has regularly invoked the principle of statutory construction that, where possible, statutes should be construed to avoid unconstitutional interpretations, particularly where the literal application of the statute in question would raise "serious constitutional problems." *DeBartolo Corp.*, 108 S. Ct. at 1397; *Catholic Bishop of Chicago*, 440 U.S. at 500.

The Court's approach in *Catholic Bishop* is particularly instructive in this regard. The issue concerned whether jurisdiction of the National Labor Relations Act extended to teachers in church-operated parochial schools. The statutory definition of "employer" was exceedingly broad, covering eight specified exemptions that did not include church-related organizations of any kind. 440 U.S. at 511 (Brennan, J., joined by White, Marshall & Blackmun, JJ., dissenting). The Court was concerned, however, that applying the statute to church-operated schools would present "a significant risk that the First Amendment [free exercise clause] will be infringed." 440 U.S. at 502.

Given this serious constitutional concern, the Court avoided it through statutory construction. Noting that when "serious constitutional questions" are raised concerning application of a statute, the Court held that it "must first identify 'the affirmative intentions of the Congress clearly expressed' before concluding that the Act" applies. 440 U.S. at 500. Applying this approach, the Court, although admitting that Congress used "very broad terms" in defining the Board's jurisdiction over "employers" (*id.* at 504), could nevertheless find "no clear expression" in either the explicit language of the statute or its

legislative history "of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act," concluding "that Congress simply gave no consideration to church-operated schools." (*id.* at 504-5). The Court concluded: "in the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." *Id.* at 507.

In view of the "serious constitutional question" that their application to attorneys' fees raises under the Sixth Amendment, the "traditional rule" followed in *Catholic Bishop* should be applied in construing the forfeiture statutes. *DeBartolo Corp.*, 108 S.Ct. at 1398. This approach would lead to a similar result.

In order to avoid the serious constitutional difficulties presented by applying the forfeiture statutes to *bona fide* attorneys' fees, the Court should read these statutes as applicable only to sham or fraudulent attorneys' fees, and not to legitimate fees that are the product of arm's length arrangement. Several district courts, without explicitly citing the *Catholic Bishop* approach, have effectively reached this conclusion based on the legislative history of the forfeiture provisions.[12] Viewing the statutory language and legislative history through the *Catholic Bishop* analysis strongly supports the conclusion reached by the district courts—not necessarily because the legislative history clearly contemplates the exemption of *bona fide* attorneys' fees, but, rather, because neither the statutory language nor the legislative history clearly reveal the "affirmative intention" that such fees be subject to forfeiture.

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[12] *See, e.g., Ianniello, supra; Bassett, supra; Reckmeyer, supra; Badalamenti, supra*; and *Rogers, supra*. *See* statutory analysis as discussed in Point I, *supra*.

In the first place, the plain language of the forfeiture statutes does not explicitly provide that attorneys' fees are forfeitable; it provides only for the forfeiture of "any property" obtained as a result of the crime. 21 U.S.C. §§ 853(a) & (c). While Congress defined the "property" subject to forfeiture in very broad terms (§ 853(b)), there is no indication in the language of the statutes that attorney's fees were deemed to be covered. Under the approach taken in *Catholic Bishop*, the broad statutory definition of "property" does not, without a strong manifestation of intent in the legislative history, constitute the "clear expression of an affirmative intention of Congress" (440 U.S. at 504) necessary to find the statutes applicable to *bona fide* attorneys' fees.

Similarly, recourse to the legislative history further demonstrates that Congress did not contemplate the application of the statute to legitimate, as opposed to fraudulent, attorneys' fees. The Senate Report, in discussing the *bona fide* purchaser exception to forfeiture, states that "[t]he provision is to be construed to deny relief to third parties acting as nominees of the defendant or who have knowingly engaged in sham or fraudulent transactions." S. Rep. 98-225 at 209 n.47. The same Senate Report states that "[t]he purpose of this provision is to permit the voiding of certain pre-conviction transfers and so close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not 'arms' length' transactions." *Id.* at 200-1.

The legislative history thus fails to demonstrate a "clear expression of an affirmative intention of Congress" to subject *bona fide* attorneys' fees to forfeiture. The fairest conclusion is "that Congress simply gave no consideration" to the application of these provisions to legitimate, as opposed to sham, attorneys' fees. Certainly, as the House Report stated, Congress expressed no intention of interfering with defendant's Sixth Amendment rights. *See Catholic Bishop*, 440 U.S. at 504-5. Indeed, this failure of Congress to consider the issue was conceded in *Nichols*, 841 F.2d at 1496, which noted that "[n]one

of these passages indicated that Congress specifically considered whether payments made to attorneys should be subject to forfeiture."

Thus, given the lack of clear intention either in the statutory language or the legislative history to indicate Congress' affirmative intention to include attorneys' fees within the ambit of "property" subject to forfeiture—and to avoid the difficult Sixth Amendment ramifications that would result from such an interpretation—the Court should follow the *Catholic Bishop* mode of statutory analysis and construe the statute not to reach legitimate attorneys' fees, but to apply it only to sham or fraudulent transfers, as was done by the Court of Appeals in this case (Pet. App. 4a).

B. Improper Legislative Delegation

The Court should also consider whether Congress actually intended to delegate to the prosecution the broad discretion that it has arrogated unto itself to apply the forfeiture provisions of the CFA to attorneys' fees. Because prosecutors can easily allege many crimes as RICO offenses, and have unfettered authority to seek forfeiture and to freeze the defendant's assets through pretrial restraining orders, the forfeiture tool can easily be abused to gain adversarial advantage and to "punish" particular defendants, or, indeed, particular lawyers. Moreover, the potential for abuse is magnified when, as here, neither the statute nor any guidelines issued by the Attorney General[13] set standards for the exercise of this awesome power,

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[13] In his 1986 testimony before the Senate Judiciary Committee on behalf of the American Bar Association, former Attorney General Elliot L. Richardson acknowledged the existence of Department of Justice Guidelines on Forfeiture of Attorneys' Fees, *see* 38 Crim. L. Rep. [BNA] 3001-08 (Oct. 2, 1985), but noted that they "play no role in the decision to seek a pretrial restraining order which affects fees. They are invoked only when a prosecutor seeks an order requiring counsel to give up fees already paid." Statement of Elliot L. Richardson, May 13, 1986, at 5. Concerning Forfeiture of Attorneys' Fees: Hearings Before The Senate Judiciary Committee, 99th Cong., 2d Sess. (May 13, 1986). Moreover, by their own terms, the guidelines are not legally enforceable. 38 Crim. L. Rep. at 3003.

which is left within the total discretion of the prosecutor. Because prosecutors alone decide whether to invoke fee forfeiture in a particular case, this "unilateral, discretionary authority" provides them with "a means to retaliate, even if only unconsciously, against their most vigorous and successful adversaries." Genego, 36 Emory L. J. at 847-48.

Congress did not foresee these possibilities when it enacted the RICO and CCE forfeiture provisions and plainly did not contemplate that in authorizing forfeitures it was giving prosecutors vast discretion to invade the Sixth Amendment rights of defendants and impair the very nature of our adversary system. Without mentioning attorneys' fees, these provisions simply authorize the forfeiture of "any property" obtained as a result of the crime in the hands of the defendant or transferred to third parties. 21 U.S.C. §§ 853 (a) & (c). The 1984 legislative history addresses merely the sham or fraudulent transfer, and does not mention attorneys' fees, other than to disclaim any intention to interfere with Sixth Amendment rights of defendants. Obviously Congress was not considering attorneys' fees —an exceptional kind of transfer which arises out of the necessity to defend and which must occur after indictment but before conviction—when it passed these statutes.

In other contexts, when a government agency or executive department purports to have authority to infringe upon fundamental rights, this Court has insisted upon an explicit legislative expression of that authority. *See, e.g., Bakke*, 438 U.S. at 308-09 (opinion of Powell, J.); *Mow Sun Wong*, 426 U.S. at 105-14; *United States* v. *Robel*, 389 U.S. 258, 275-76 (1967) (Brennan, J., concurring); *Greene* v. *McElroy*, 360 U.S. 474, 507 (1959); *Kent* v. *Dulles*, 357 U.S. at 129; *cf. City of Lakewood* v. *Plain Dealer Pub. Co.*, 108 S. Ct. 2138, 2143-44 (1988) (delegation of power to restrict First Amendment rights requires more than broad legislative directives to guide the restricting authority); *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 150-51 (1969) (same).

In *Kent*, the leading case, the Supreme Court held that the Passport Act of 1926, which granted the Secretary of State the

authority to "grant and issue passports . . . under such rules as the President shall designate and prescribe," was insufficient authority for a subsequent regulation—issued in 1952—prohibiting issuance of passports to members of the Communist Party. Finding that the regulation would raise serious questions in view of its impact on the constitutionally-protected right to travel, the Court held that "[w]here activities or enjoyment, natural and often necessary to the well-being of an American citizen . . . are involved, we will construe narrowly all delegated powers that curtail or dilute them." 357 U.S. at 129. Referring to the Passport Act, the Court could not "find in this broad generalized power an authority to trench so heavily on the rights of the citizen." *Id. See* Bickel, *supra*, 164-66.

The Court in *Kent* began its analysis by noting that where a regulation affected the exercise of a constitutionally-protected right, the Court "will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold it." 357 U.S. at 129. Any regulation of such a liberty interest "must be subject to the law-making function of the Congress," *id.*, which, if delegated, must be pursuant to an adequate standard. Referring to the Passport Act, the Court noted its hesitancy "to find in this broad generalized power an authority to trench so heavily on the rights of the citizen." *Id.* The Court therefore avoided what it characterized as the "important constitutional questions" that would be raised if Congress had given authority to the Secretary "to withhold passports to citizens because of their beliefs or associations." *Id.* at 130. Noting that "Congress has made no such provision in explicit terms" in the Passport Act, the Court held that "absent one," the Secretary could not enforce the regulations. *Id.*

Kent, accordingly, was not treated simply as a case of statutory construction. The broad language of the Passport Act was not ambiguous, and the Congressional history did not negate this application. *Kent* was an administrative law case in which the agency asserted an "unbridled discretion" to act in a constitutionally questionable way. The Court quite sensibly

avoided deciding whether Congress had the constitutional power to act directly in this way or to grant this authority to an agency. A constitutional holding would have been preemptive. Instead, the Court, in effect, expressed its uncertainty as to whether Congress had intended to delegate this constitutionally questionable power to its agent, thereby remanding the issue to Congress for clarification.[14]

The analogy here is a strong one. Like the Secretary of State in *Kent*, the prosecutor in the forfeiture situation is an agent asserting authority delegated by Congress. In these situations, the delegation is exceedingly broad, and, in both, questions are raised about whether the power asserted is within the contemplation of Congress' delegation. The forfeiture provisions give prosecutors broad authority to forfeit assets generally, much like the broad language of the Passport Act involved in *Kent*. Moreover, the forfeiture provisions do not name attorneys' fees, any more than the Passport Act mentioned the possibility that passports could be denied based on political party affiliation. There is no indication that Congress thought that it was authorizing the use of the forfeiture provisions to prevent defendants from retaining counsel when it amended these provisions in 1984. The 1984 amendments added a number of tools designed to provide prosecutors with broader opportunities for forfeiture, designed in particular to end the fraudulent transfers that had frustrated earlier forfeiture provisions of RICO and CCE. However, neither the language nor the legislative history of these amendments suggests a widening of forfeiture to legitimate attorneys' fees.

Congress plainly has not thought sufficiently about the problem of application of these statutes to attorneys' fees, if it has

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[14] *See Greene* v. *McElroy*, 360 U.S. at 507 ("[E]xplicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them").

thought about the issue at all. The approach suggested here has the virtue of leaving the balancing of these weighty and profound interests, and the resolution of these complex problems, with Congress in the first instance, and does not silence the debate by judicial fiat. *Caplin & Drysdale*, 837 F.2d at 848-49. Rather, it stimulates the debate on an issue that obviously has not as yet been debated sufficiently.

Particularly where, as here, courts are faced with broad assertions of discretionary power that could seriously invade constitutional rights, a general legislative delegation can thus be found insufficient to support the claimed assertion of authority. This allows courts to avoid deciding a difficult constitutional issue and, in effect, remands the underlying policy question to the legislature for decision with an awareness that its choice will implicate fundamental values and will be subjected to searching constitutional scrutiny. *See* A. Bickel, *supra*, at 111-98, Given the dubious constitutionality of applying the forfeiture statutes to *bona fide* attorneys' fees and the absence of considered Congressional judgment, this legislative remand or "second look" approach seems especially appropriate in the forfeiture context. The Court should therefore invoke the doctrine of *Kent* v. *Dulles* in order to find the asserted discretionary power of prosecutors to use the forfeiture statutes against legitimate attorneys' fees to be *ultra vires*.

C. Legislative Remand

This concept of the "legislative remand" or "sending the law back" for "a second look" is another available option by which this Court may defer reaching the constitutional issue that is otherwise squarely posed.

A recent and closely related use of this doctrine occurred in Justice O'Connor's concurring opinion in *Thompson* v. *Oklahoma*, 108 S. Ct. 2687, 2706 (1988) (O'Connor, J., concurring)—the juvenile death penalty case. While four Justices were of the view that the Eighth Amendment prohibited the execution of a defendant for murder committed as a 15 year old,

Justice O'Connor joined the plurality but avoided reaching the constitutional question.

Instead, Justice O'Connor found "considerable risk that the Oklahoma Legislature either did not realize that its actions would have the effect of rendering 15 year olds death-eligible or did not give the question the serious consideration that would have reflected in the explicit choice of some minimum age for death eligibility." *Id.* at 2711. In the absence of such specificity, Justice O'Connor found that the statute presented the Court with a serious constitutional dilemma—"a result that is of very dubious constitutionality, and . . . without the earmarks of careful consideration that we have required for other kinds of decisions leading to the death penalty." *Id.* This result, she noted, was dictated not only by the Court's Eighth Amendment jurisprudence, but "[i]t is also supported by the familiar principle—applied in different ways in different contexts—according to which we should avoid unnecessary, or unnecessarily broad, constitutional adjudication." *Id.*

Accordingly, by leaving open the constitutional question, but nonetheless applying non-constitutional grounds to invalidate the State's broad interpretation of the statute, Justice O'Connor "allow[ed] the ultimate moral issue at stake in the constitutional question to be addressed in the first instance by those best suited to do so, the people's elected representatives." *Id.*

Such a legislative "second look", as counseled by Justice O'Connor, might be equally appropriate here. As Professor Bickel explained the rationale for such a "remand" in *Kent:*

> [There] is a step beyond holding Congress to its responsibility for a policy decision that it has failed to make—altogether or with sufficient particularity. This was remanding to Congress for a second look—not for the necessary initial decision, but for orderly, deliberate, explicit, and formal reconsideration of a decision previously made, but made backhandedly, offhandedly, less explicitly than desirable with respect to an issue of such grave importance.

Bickel, *The Least Dangerous Branch*, at 165-66, *See also* G. Calabresi, *A Common Law for the Age of Statutes* at 135-36 (1982) (where the law is "out of phase" with prevailing legal landscape, and there is no evidence of clearly articulated support for the contested interpretation in the legislative history, "sending that law back" for a "second look" is an appropriate exercise of prudence so the legislative body may properly consider potential constitutional consequences of law's impact); Tribe, American Constitutional Law § 17-2 at 1680 & n. 16 (2d ed. 1988).

Such a "remand", as counseled by Justice O'Connor in *Thompson*, and Professors Bickel and Calabresi, might well be a wise course for the Court's consideration, given the vagrant legislative history available in this case on an issue of such fundamental constitutional magnitude.

D. Broad Construction of Equitable Powers Under The Statute

Judge Winter, concurring in the *en banc* judgment below, offers yet another approach that saves the statute, protects defendants' entitlement to *bona fide* attorneys' fees and avoids the constitutional questions. *See* Pet. App. 10a-26a. Joined by Judges Newman and Meskill, Judge Winter finds that the statute does not divest the district courts of their traditional equitable power to fashion appropriate remedies in connection with the granting of injunctive relief where a defendant's assets are sequestered pretrial—*compare United States* v. *Thier*, 801 F.2d at 1474. Judge Winter further holds that, given the unique place of attorneys in the criminal justice system, it would be an abuse of discretion not to permanently exempt from forfeiture any funds required by a defendant for essential legitimate expenditures, including attorneys' fees. *See also Thier*, 801 F.2d at 1476-77 (Rubin, J., concurring). For an extensive exposition of Judge Winter's equitable approach, *see* Petitioner's Brief, Point I, at 11-33, filed in No. 87-1729, *Caplin &*

Drysdale v. *United States*, which is being heard *in tandem* with this case.[15]

III. IF THE STATUTE IS READ TO INCLUDE ATTORNEYS' FEES WITHIN THE AMBIT OF FORFEITABLE PROPERTY UNDER THE CFA, IT VIOLATES DEFENDANT'S RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS

Careful analysis of the forfeiture provisions of the CFA and its legislative history, when measured against the defendant's fundamental rights to counsel of choice and due process in the proper functioning of the adversary system (with its proper balance of forces between the state and the accused), and the fatal constitutional flaw in the statute becomes clear. In short, those courts which have upheld the statute against Fifth and Sixth Amendment challenges have failed to properly balance the fundamental constitutional protections afforded the accused with the actions of the legislature which have the possibly unintended effect—and the legislative history is, after all, totally ambiguous in this regard—of impinging mightily upon those fundamental protections. *See, e.g., Walters* v. *National Association of Radiation Survivors*, 473 U.S. 305, 368-69 (1985) (Stevens, J., joined by Brennan and Marshall, JJ., dissenting) ("The fundamental error in the Court's analysis is its assumption that the individual's right to employ counsel of his choice in a contest with his sovereign is a kind of second-

[15] Similarly, Judge Winter further concluded, any assets transferred prior to conviction, as directed by the district court, must not be subject to post-conviction forfeiture. This conclusion follows both from the use of the permissive "may" language in § 853(c) and from the Catch-22 result that would occur if assets used by the defendant, with the district court's permission, to pay for legitimate living expenses and legal fees, could subsequently be recaptured from the payees through post-conviction forfeiture. Any other construction "would essentially nullify the district court's equitable authority to permit defendants to make ordinary lawful expenditures under § 853(e)(1)" (Pet. App. 22a). *See* Pet. Br. at 28-32, *Caplin & Drysdale, Chartered*, No. 87-1729.

class interest that can be assigned a material value and balanced on a utilitarian scale of costs and benefits").

Here, in the face of a statute and legislative history that are virtually silent on the question of attorneys' fees' inclusion as forfeitable assets, it is appropriate that we properly balance the respective interests before concluding that defendant's fundamental constitutional rights to counsel of choice and to a properly functioning adversary system may be so easily set aside in favor of governmental expediency in the enforcement of its forfeiture statutes, particularly where the constitutional question at issue appears largely to have been ignored by Congress.

A. Defendant's Constitutional Right To Counsel Of Choice And The Role Of Counsel In The Adversary System

It bears emphasis that the right to be represented by counsel is among the most fundamental of rights. *Penson* v. *Ohio*, No. 87-6116, 57 U.S.L.W. 4020, 4022 (U.S. November 29, 1988). As a general matter, it is through counsel that all other rights of the accused are protected: "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." Schaefer, *Federalism and State Criminal Procedure*, 70 Harvard L. Rev. 1, 8 (1956); *see also Kimmelman* v. *Morrison*, 447 U.S. 365, 377 (1986); *United States* v. *Cronic*, 466 U.S. 648, 654 (1984).

The Sixth Amendment, however, provides a defendant substantially more than the mere absolute right to counsel. The right to counsel includes the right to employ counsel of choice. *Wheat* v. *United States*, 108 S.Ct. 1692, 1697, 1700 (1988) (presumption in favor of counsel of choice); *Powell* v. *Alabama*, 287 U.S. 45, 53 (1932); *Chandler* v. *Fretag*, 348 U.S. 3, 9-10 (1954); *Glasser* v. *United States*, 315 U.S. 60, 70 (1942). This right to counsel of choice may be restricted only if there is a significantly compelling and countervailing governmental interest. *See, e.g., Flanagan* v. *United States*, 465 U.S. 259,

268 (1984); *United States* v. *Rankin*, 779 F.2d 956, 960 (3d Cir. 1986); *Wilson* v. *Mintzes*, 761 F.2d 275, 285 (6th Cir. 1985); *United States* v. *Phillips*, 699 F.2d 798, 801-02 (6th Cir. 1983); *Linton* v. *Perini*, 656 F.2d 207 (6th Cir. 1981); *United States* v. *Laura*, 607 F.2d 52, 58 (3d Cir. 1979).

Indeed, although the right to counsel of choice may not be absolute, and may depend on the financial resources of the individual who seeks to exercise it, the right is unquestionably a fundamental component of the Sixth Amendment. *Wheat*, 108 S.Ct. at 1697 (recognizing presumption in favor of "the right to select and be represented by one's preferred attorney"). Moreover, although the right to appointed counsel is now recognized, *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), counsel of choice was the primary right the Sixth Amendment was initially designed to protect. Thus, long before it was regarded as a source for the right to appointed counsel, the Sixth Amendment guaranteed the fundamental right to retain counsel of choice. Indeed, when it first recognized a qualified right to appointment of counsel in capital cases in 1932, the Supreme Court referred to it as "a logical corollary from the constitutional right to be heard by counsel." *Powell*, 287 U.S. at 72.

The courts have thus recognized that the right to counsel of choice serves substantial interests apart from the general interest in accuracy in adjudication. As this Court recognized in *Flanagan*, 465 U.S. at 267-68, the right to counsel of choice "reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceedings." Thus, "[t]he right to counsel of choice, like the right to self-representation, is premised on respect for the individual . . ." *Mintzes*, 761 F.2d at 286. The defendant's basic right to choose the type of defense he wishes to mount also supports the right to select counsel of choice, "[f]or the most important decision a defendant makes in shaping his defense is his selection of an attorney." *Laura*, 607 F.2d at 56.

None of these policies underlying the right to counsel of choice would be satisfied by appointed counsel as a substitute,

"since, unlike the right to counsel of choice, 'the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.'" *Mintzes*, 761 F.2d at 285 (quoting *United States* v. *Cronic*, 466 U.S. at 658).

Permitting the accused to select his own counsel also promotes his interest in having assistance independent of the sovereign prosecuting and judging him. Winick, *Forfeiture of Attorneys' Fees*, 43 U. Miami L. Rev. ____, Mss. 44 & nn. 150-151. It further promotes the public interest in preserving an independent private criminal defense bar. Cloud, 1987 Wisc. L. Rev. at 1-4, 8-9 ("Simply put, the Constitution treats the activities of criminal defense attorneys differently precisely because they are different, from an institutional perspective, from other members of the profession *** In the context of the criminal justice system, the defendant's attorney must utilize the adversary system to accomplish an additional function—to exercise the systemic restraints placed upon the power of government in our society of liberties").

Few constitutional rights, including the right to counsel of choice, are absolute. *See Wheat* v. *United States*, 108 S.Ct. at 1697. Even fundamental rights like the First Amendment must yield to governmental regulation advancing a "compelling state interest." *See, e.g., Wisconsin* v. *Yoder*, 406 U.S. 205 (1972) (First Amendment right to free exercise of religion); *Konigsberg* v. *State Bar*, 366 U.S. 36 (1961) (First Amendment right to freedom of expression); *Roe* v. *Wade*, 410 U.S. 113, 154-55 (1973) (right to abortion); *see* L. Tribe, *American Constitutional Law* § 12-2 *passim*; § 12-8 *passim*. However, it is no answer that the defendant, after forfeiture, retains a right to appointed counsel. Rather, the question is whether the Government's seizure of his assets can be justified when balanced against the significant individual and societal interests underlying the specific constitutional right to counsel of choice.

In striking this balance, a standard of heightened scrutiny, demanding compelling justification to outweigh the right to

counsel of choice, is appropriate. *Monsanto* (Pet. App. 5a) (Feinberg, Ch. J., concurring). What is at stake here is no mere regulation of the right or postponement of its exercise, for which lesser scrutiny may suffice. *Compare Roe* v. *Wade*, *supra* (first trimester abortion may not be made unlawful; strict scrutiny applied) *with Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976) (abortion recordkeeping and reporting requirements upheld; lesser scrutiny applied.)[16]

Rather, what is involved is the *wholesale abridgement* of the right to counsel of choice. When a defendant is stripped of all his assets, his right to retain counsel of choice is not merely postponed or its exercise limited by the need to accommodate the demands of the administration of justice; his ability to exercise the right is *totally abridged*.[17] Unlike trial-related instances of balancing the defendant's right to counsel of choice against the demands of the efficient administration of justice, the RICO and narcotics forfeiture provisions involve govern-

[16] Strict scrutiny is also counseled by First Amendment principles, which in the context of the right to use counsel to assert legal rights, overlap with those of the Sixth Amendment. The use of counsel by a criminal defendant to assert rights on his behalf is protected by the First Amendment "right to hire attorneys on a salary basis to assist . . . in the assertion of . . . legal rights." *United Mine Workers* v. *Illinois Bar Ass'n*, 389 U.S. 217, 222 (1967); *accord United Transp. Union* v. *Michigan*, 401 U.S. 576, 585 (1971); *Brotherhood of R.R. Trainmen* v. *Virginia*, 377 U.S. 1, 5-6 (1964); *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 429-30 (1963); *Matter of Abrams*, 62 N.Y.2d 183, 476 N.Y.S.2d 494, 405 N.E.2d 1, 7 (1984) (First Amendment protects criminal defendant's right to counsel of choice). *See also Walters*, 473 U.S. at 368-71 (Stevens, J., joined by Brennan & Marshall, JJ., dissenting) (right of individual to consult with counsel of choice with own funds in controversy with sovereign protected by First and Fifth Amendments).

[17] As Chief Judge Feinberg wrote in his post-*Wheat* concurring opinion in *Monsanto* (Pet. App. 5a):

> [T]he right to counsel of choice cannot be infringed unless a compelling governmental purpose outweighs it. Many of the cases that allow limitations on the right to counsel of choice deal only with partial limitations or infringements, such as preventing a defendant from substituting counsel once the trial has begun . . . or disqualifying a particular lawyer . . . . In contrast, the right in this case is destroyed almost completely by depriving the defendant of the means to retain counsel of choice prior to the commencement of the trial.

mental action that strips a defendant of all his assets, thereby totally precluding his ability to retain counsel. If anything, therefore, the highest level of scrutiny should be applied.[18]

This heightened scrutiny should apply to governmental action that renders it impossible for a defendant to exercise the fundamental Sixth Amendment right to retain counsel for his defense. Thus, when an individual would otherwise have sufficient resources to exercise the right, but government acts in some way to interfere with the use of those resources, the rationale undergirding the governmental action in question must be compelling. Thus, it is no answer that the defendant after seizure is left without sufficient assets to retain counsel of choice; rather, the question is whether the government's restraint of his assets can be justified when balanced against the significant individual and societal interests underlying the constitutional right to counsel of choice.[19] Clearly, it cannot be.

[18] The cases dealing with the right to counsel of choice usually involve questions of continuances to enable the defendant to retain counsel, or to allow his chosen counsel to be available, or judicial attempts to restrict the defendant's choice of counsel because chosen counsel labors under a conflict of interest or is not a member of the bar of the court. These involve regulations on exercise of the right, not its total abridgment. Yet, even in these contexts, courts have routinely treated the right to counsel of choice as a right which "must be carefully balanced against the public's interest in the orderly administration of justice." *See, e.g., United States* v. *Panzandi Alvarez*, 816 F.2d 813, 817 (1st Cir. 1987) (the right "cannot be denied without a showing that the exercise of that right would interfere with the fair, orderly and expeditious administration of justice."); *Rankin*, 779 F.2d at 958 (the right "may not be hindered unnecessarily"); *Perini*, 656 F.2d at 211 (defendant may not be denied the right "arbitrarily and without adequate reason"); *Laura*, 607 F.2d at 56 (the "arbitrary dismissal of a defendant's attorney of choice violates a defendant's right to counsel").

[19] For this reason, the Fourth Circuit in *Caplin & Drysdale* was wrong to equate "purely private predicaments [which] may leave a defendant without the counsel of his choice," such as financial inability, with government-imposed forfeiture. 837 F.2d at 645. Compare the analysis in *United States* v. *Unit No. 7 & Unit No. 8*, 853 F.2d 1445, 1451 (8th Cir. 1988):

> The government's action here cannot be equated to other "vagaries of life" which may deplete a defendant's resources. It is one thing for a person to be unable to pay his or her lawyer because he or she lost money in bad investments, spent it in other ways, or never had it to begin with. It is an entirely different matter for the government . . . purposefully to deprive the defendant of the very assets he needs to pay his lawyer. This is more like a preemptive strike than a vagary of life.

As noted by Justice Stevens in *Walters*, 473 U.S. at 370 (Stevens, J., with Brennan & Marshall, JJ., dissenting):

> In my view, regardless of the nature of the dispute between the sovereign and the citizen—[including] a criminal trial . . .—the citizen's right to consult an independent lawyer and to retain that lawyer to speak on his or her behalf is an aspect of liberty that is priceless.

B. The Government's Interest In Seeking Forfeiture Of Dependant's Attorney's Fees

The cases dealing with the right to counsel of choice usually involve questions of continuances to enable the defendant to retain counsel, to substitute new counsel, to allow his chosen counsel to be available, or judicial attempts to restrict the defendant's choice of counsel because chosen counsel labors under a conflict of interest or is not a member of the bar of the court. *See Wheat* v. *United States*, 108 S.Ct. at 1697-99; *Morris* v. *Slappy*, 461 U.S. 1, 11-12 (1983); *Leis* v. *Flynt*, 439 U.S. 438 (1979).

Unlike these trial-related instances of balancing the defendant's right to counsel of choice against the demands of the efficient administration of justice, the RICO and CCE forfeiture provisions involve governmental action to strip a defendant of all his assets, thereby totally precluding his ability to retain *any* private counsel, not merely excluding a particular attorney from representation. The same result may be achieved either through stripping the defendant of his assets by pretrial seizure or by proceeding post-trial to forfeit assets previously transferred as a *bona fide* fee.

The government has sought to avoid the burden of justifying its intrusion into the defendant's constitutional rights by equating the situation involving forfeiture of property in the defendant's possession with a situation involving a defendant apprehended in possession of assets manifestly the property of some third party, *i.e.*, a defendant arrested outside a bank with the proceeds of a bank robbery. The bank robbery proceeds may not, of course, be used to hire an attorney. *See* Morgan, *An Introduction To The Debate Over Fee Forfeitures*, 36 Emory L. J. 755, 755-57 (1987). The cash proceeds belong to the bank or to its depositors, and this is true even in the absence of a forfeiture statute. These wrongfully deprived owners have a common law right to the return of their property, and the government has a compelling interest in obtaining its return that plainly outweighs the robber's claim to use it for any purpose, even to hire an attorney. Moreover, this interest simply cannot be accomplished in any way other than the return of the property.

In the forfeiture context, however, where the defendant asserts colorable title to the assets at issue, the government's interest in stripping the accused of his property is not frustrated by permitting a portion of the property to be transferred to defense counsel. *See United States* v. *Nichols*, 841 F.2d at 1510 (Logan, J., dissenting) ("The government's interest in forfeited property, on the other hand, does not derive from a common law ownersip right to the property, for the government neither owned the property before the crime nor gave value for the property as a creditor or purchaser does").[20]

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[20] A similar argument distinguishes the jeopardy tax assessment authorized by 26 U.S.C. § 6861. *See* Cloud, 1987 Wisc. L. Rev. at 40 n.189 (distinguishing termination and jeopardy assessment line of cases). As in the case of the robbery of property belonging to a third party, the jeopardy assessment situation involves a claim to property, in this case by the government, that has a source independent of the statute authorizing the assessment and arising prior to the acts justifying the assessment or attachment. *See Nichols*, 841 F.2d at 1510 (Logan, J., dissenting) (equating government's interest in jeopardy tax assessment with the common law interest of a creditor claiming a lien against a debtor's property); *Harvey*, 814 F.2d at 926 ("The critical distinction, if one be needed, is that the jeopardy assessment has as its purpose the preservation of property already owed and wrongfully withheld from the government"). The government interest in pursuing its claim and in preserving its ability ultimately to have it satisfied justifies the jeopardy assessment. Here, by contrast, the government's claim is based on the forfeiture statute itself, rather than on an independent source, and does not precede the defendant's possession of the property.

In addition, the tax laws are designed to raise revenues. The forfeiture laws, however, are not designed for this purpose. They are penal in nature. *See Monsanto* (Pet. App. 15a) (Winter, J., joined by Meskill & Newman, JJ., concurring) (noting government's concession at oral argument). As a result,

The government seeks to equate these two disparate situations by invoking the "relation-back" provisions of the forfeiture statutes, under which title to the property vests in the United States upon commission of the criminal act. But unlike the loot from the hypothetical bank robbery, which belongs to the bank or its depositors, the property forfeited under the relation-back rule "belongs" to the government only under a legal fiction embodied in the statute. Use of this legal fiction to deprive the defendant of his common law property rights and of his Sixth Amendment right to counsel of choice, however, must nonetheless be justified by some underlying compelling governmental interest. L. Fuller, *Legal Fictions* 10, 70-71 (1967).[21]

According to the government, the criminal forfeiture provisions were designed to deprive criminal organizations of their economic bases. S. Rep. 98-225 at 191. The legislative history suggests that the pre-conviction transfers sought to be prevented or voided were those to parties who were not dealing at "arms' length" with a defendant; in other words, "sham" transactions. For example, the Senate Report explains the relation-back amendments as follows:

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the government's purpose—to strip racketeering and drug trafficking offenders and organizations of their economic power—can be fully achieved even if a part of the forfeiture goes to a defense lawyer rather than to the government itself. *See id.* (distinguishing cases involving "the seizure of property when revenue raising purposes are implicated").

[21] Judge Phillips of the Fourth Circuit saw the issue clearly:

> [T]he ultimate constitutional issue might well be framed precisely as whether Congress may use this wholly fictive device of property law to cut off this fundamental right of the accused in a criminal case. If the right must yield here to countervailing governmental interests, the relation-back device undoubtedly could be used to implement the governmental interests, but surely it cannot serve as a substitute for them. Under developed principles defining the qualified right to counsel of choice, the dispositive issue is whether there *are* countervailing governmental interests that do justify the drastic expedient of freezing and ultimately forfeiting the assets of RICO and CCE defendants to the point that they cannot retain private counsel for their defense.

Caplin & Drysdale, 837 F.2d at 651-52 (Phillips, J., joined by Winter, Ch. J., Sprouse & Ervin, JJ., dissenting).

> The purpose of this provision is to permit the voiding of certain pre-conviction transfers and so close a potential loophole in a current law whereby the criminal forfeiture sanction could be avoided by transfers that were not "arms' length" transactions. *On the other hand, this provision should not operate to the detriment of innocent bona fide purchasers of the defendant's property* (S. Rep. 98-225 at 200-1) (emphasis added).

Elsewhere, the Senate Report states that the third party provisions "should be construed to deny relief to third parties acting as nominees of the defendant or who have knowingly engaged in sham or fraudulent transactions." S. Rep. 98-225 at 209 n.47.

No one would argue that these governmental interests outweigh any interest by a defendant in transferring tainted properties to his counsel as a *sham* transaction to prevent forfeiture. Such sham or fraudulent transfers, in the view of the panel opinion in the *Harvey* case, "define the permissible constitutional reach of the Act in permitting the forfeiture of attorneys' fees." 814 F.2d at 924. Exempting *bona fide* attorneys' fees from pre-conviction restraint, however, will not undermine the legislative purpose of stripping criminals of their economic bases. *Thier*, 801 F.2d at 1474-75. Nor will it permit the defendant, as noted by Chief Judge Feinberg, "to retain his ill-gotten economic power after conviction" nor "to shelter untainted assets by paying a lawyer with tainted property first." (Pet. App. 5a-6a). The government's legitimate interest in punishing crime is not implicated, as punishment constitutionally may be imposed only after conviction.[22]

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[22] *E.g.*, *United States* v. *Salerno*, 481 U.S. 739 (1987); *Jones* v. *United States*, 463 U.S. 354, 369 (1983); *Bell* v. *Wolfish*, 441 U.S. 520, 535 & n.16 (1979); *United States* v. *Unit No. 7 & Unit No. 8*, 853 F.2d at 1451-52. Moreover, the legislative history of the forfeiture statutes reveals that Congress, in enacting the pretrial restraint provisions, was concerned not with punishing the defendant prior to conviction, but merely with preventing fraudulent transfers, improper dispositions, or concealment of assets that might be subject to forfeiture post-conviction. *Monsanto* (Pet. App. 15a) (Winter, J., concurring).

The government's interest in forfeiture is not to raise revenue, and the government thus may not assert a financial interest in attorneys' fees. *United States* v. *Lizza Industries*, 775 F.2d 492 (2d Cir. 1985). Nor may the government assert a legitimate interest in the adversarial advantage it will gain by preventing the defendant from hiring his chosen counsel.[23] As a result, its interest in preventing the use of "ill-gotten economic power" to hire attorneys is "weak" in the context of *bona fide* fees, and cannot outweigh the defendant's constitutional right to counsel of choice. (Pet. App. 6a) The "small societal cost" of exempting such *bona fide* fees from forfeiture "is the price we must pay for protecting the rights of the innocent, who might otherwise be deprived of legitimate economic power in waging a full defense." (*Id.*)

Applying the forfeiture statutes to legitimate as opposed to sham attorneys' fees will not promote the predominant Congressional interest asserted in the legislative history of the 1984 amendments—the avoidance of fraudulent transfers. So long as it can be assured that the fee paid to the attorney is a *bona fide* and reasonable one, rather than a sham or fraudulent transfer designed to avoid forfeiture, Congress' stated purpose is not frustrated. Indeed, exempting legitimate attorneys' fees from forfeiture in fact would serve Congress' interest in stripping drug dealers and racketeers of their "economic power bases." Cloud, *Government Intrusions into the Attorney-Client Relationship: The Impact of Fee Forfeitures on the Balance of Power in the Adversary System of Criminal Justice*, 36 Emory L. J. 817, 832 (1987) ("Payment of fees to defense counsel actually guarantees that a defendant will "lose" the asset. Even if the defendant is acquitted, the asset is conveyed to the attorney").

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[23] *See Monsanto* (Pet App. 6a) (Feinberg, Ch. J., concurring) ("[O]f course, weakening the ability of an accused to represent himself at trial is an advantage for the government. But it is not a legitimate government interest that can be used to justify invasion of a constitutional right.").

While removal of a defendant's economic base upon conviction is doubtless an important interest, the notion that the government is merely protecting "public funds" when it seeks to prevent the use of *potentially* forfeitable assets to defend against the underlying criminal action by preventing him from paying for legitimate legal service, is simply a distortion of reality. A defendant's assets may be forfeited only *after* conviction and proof that the assets were used in, or were the fruits of, criminal activity. *See United States* v. *Veon*, 549 F.Supp. 274, 280 (E.D.Cal. 1982). The relation-back doctrine is merely a legal fiction with a particular purpose—to prevent defendants ultimately convicted from evading forfeiture by subterfuge. The government is not, as it would have this Court believe, merely protecting public funds when it relies on the "relation-back" doctrine. Instead, it is asserting its own adversarial interest in the imposition of a forfeiture penalty.

As a result, because the interests asserted by Congress in support of the forfeiture provisions are not furthered by the forfeiture of legitimate—as opposed to sham or fraudulent—attorneys' fees, application of the provisions to such fees is gratuitous and unnecessary. Whatever the result if Congress were to seek to further other compelling interests through forfeiture, the application of the forfeiture provisions of RICO and CCE to legitimate attorneys' fees thus constitutes an arbitrary and unreasonable intrusion of the defendant's right to counsel of choice. *See Cloud*, 1987 Wisc. L. Rev. at 44-57.

C. The Threat Of Attorney Fee Forfeiture To The Adversary System Of Justice

Even if the government were able to show a substantial countervailing governmental interest to override the defendants' right to counsel of choice, application of the forfeiture provisions to legitimate attorney's fees would still violate the Fifth and Sixth Amendments, notwithstanding the availability of court-appointed counsel.

Subjecting attorney's fees to forfeiture would violate a defendant's right to due process by giving the prosecution the

power to decide whether a defendant will be represented by a particular counsel of his own choice. This would follow from its power to add a RICO and narcotics charge, include a broad list of assets allegedly subject to forfeiture and inform defense counsel that he is "on notice" or obtain an *ex parte* restraining order. Given the potential for prosecutorial abuse or manipulation, such a veto power over the defendant's choice of counsel is clearly intolerable. As the court in *Rogers* aptly noted "[t]he government would possess the ultimate tactical advantage of being able to exclude competent defense counsel as it chooses. By appending a charge of forfeiture to an indictment under RICO, the prosecutor could exclude those defense counsel which he felt to be skilled adversaries." 602 F.Supp. at 1350.

The *Rogers* court is hardly alone in its recognition of the dire threat to the adversary system brought about by restraining orders and forfeitures. There has been an obvious—and already noticeable—"chilling effect" upon the willingness of capable and talented private attorneys to continue to represent clients charged with RICO or narcotics offenses, given the government's potential for manipulation of the forfeiture vehicle to exclude "undesirable"—i.e., unduly resourceful or aggressive—attorneys from participation in these cases. *See, e.g.*, City Bar Report, 41 The Record at 478-79; Genego Study, *supra*, at n.5; *Cloud*, 1987 Wisc. L. Rev. at 1-15; Note, 61 N.Y.U. L. Rev. at 146-48; Note, 39 Stanford L. Rev. at 678.

Forfeiture of attorneys' fees accordingly presents a grave threat to the very nature of our adversary system. The unfettered discretion asserted for prosecutors under the government's interpretation of the forfeiture statutes creates a serious potential for prosecutorial abuse. Virtually any indictment charging a felony violation of federal law can be framed as a RICO indictment.[24] As a result, the government can gain the

[24] It is estimated that as many as 25% of the criminal cases brought in federal court now involve offenses subject to criminal forfeiture. *See Nichols*, 841 F.2d at 1488. Winick, *Forfeiture of Attorneys' Fees*, 43 U. Miami L. Rev. ——, Mss. 2 n.4.

"ultimate tactical advantage of being able to exclude competent defense counsel as it chooses merely by appending a forfeiture count to the indictment."[25] The government would thus be able effectively to deprive a defendant of counsel already retained by making it unlikely that counsel would be paid or would be able to retain any fees already received.[26] Similarly, for the defendant who has not yet retained counsel—as was the predicament of respondent herein—the government can use the forfeiture procedure virtually to eliminate the pool of private attorneys willing to provide representation, relegating the defendant to appointed counsel. *See* Note, 61 N.Y.U. L. Rev. at 146-48.

Were the forfeiture statutes so broadly construed, the prosecutor would enjoy awesome power to affect the balance between the accused and the government in the criminal process. *See Wardius* v. *Oregon*, 412 U.S. 470, 474-75 (1973) (due process requires "balance of forces between the accused and his accuser"). The unfettered power to disqualify the defendant's selected advocate and render virtually unavailable representation by any private counsel provides the prosecutor an unfair tactical advantage that would transform our existing adversary system. The private criminal defense bar provides a significant check on the power of the prosecutor and judge. To serve this checking function, as the Supreme Court has repeatedly recognized, the defense lawyer must be independent of the

[25] *Rogers*, 602 F.Supp. at 1347; *accord Monsanto* (Pet. App. 9a) (Oakes J., concurring) ("The forfeiture statute puts too much power in the hands of the prosecution to determine who will *not* be defense counsel . . . ."); *United States* v. *$70,476 in U.S. Currency*, 677 F.Supp. 639, 646 (N.D. Cal. 1987), *appeal dismissed*, 845 F.2d 329 (9th Cir. 1988) ("In effect, the prosecutor could have a role in selecting, influencing, or vetoing the defendant's choice of counsel."). *See generally* Genego, *Prosecutorial Control Over a Defendant's Choice of Counsel*, 27 Santa Clara L. Rev. 17 (1987).

[26] *Thier*, 801 F.2d at 1476, (Rubin, J., concurring) ("The tool of the restraining order, thus put into the hands of the prosecution, gives the government power to exclude vigorous and specialized defense counsel"); *$70,476 in U.S. Currency*, 677 F.Supp. at 646 (forfeiture "could be used by the government to discourage employment of vigorous and specialized defense counsel").

government.[27] Our existing system of criminal representation, placing substantial reliance on the private bar, insures this essential independence (as well as its appearance) far more than would a system relying exclusively on lawyers paid by or employed by the government in certain classes of cases. Yet the private bar would be effectively excluded from these cases as a result of fee forfeiture. Moreover, those private lawyers willing to represent clients who have not yet had the use of their assets restrained would find their independence compromised by the prospect of continued representation only at the grace of prosecutors who are their adversaries in the proceeding.[28]

Here, of course, is the pernicious danger that is papered-over in *Caplin & Drysdale* (but fully recognized by *Monsanto*). Carried to its logical conclusion (and given the untrammelled authority by which the government may add a forfeiture count to any RICO or narcotics indictment), the simplicity with which the government may enforce the forfeiture statutes has all but invited the government to seek the removal (or prevent the retention) of any attorney it wishes. Despite their unique (and irreplaceable) role in the adversary system, defense counsel may now be effectively "neutered" at the whim of the

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[27] *See, e.g., United States* v. *Cronic*, 466 U.S. at 656 n.17 ("[A]n indispensable element of the effective performance of [defense counsel's] responsibilities is the ability to act independently of the government and to oppose it in adversary litigation.") (*quoting Ferri* v. *Ackerman*, 444 U.S. 193, 204 (1979)); *Polk County* v. *Dodson*, 454 U.S. 312, 322 (1981) ("There can be no fair trial unless the accused receives the services of an effective and independent advocate.")

[28] *See United States* v. *Estevez*, 645 F.Supp. 869, 871-72 (E.D. Wis. 1986), *aff'd on other grounds sub nom. United States* v. *Moya-Gomez, 860 F.2d 706 (7th Cir. 1988)*; Genego, 36 Emory L. J. at 841-43. The mere existence of this threat to independence may violate the Sixth Amendment. *See Strickland* v. *Washington*, 466 U.S. 668, 685-87 (1984) ("Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense."); *cf. City of Lakewood* v. *Plain Dealer Pub. Co.*, 108 S. Ct. at 2144 ("[T]he mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused.").

prosecution. Indeed, perhaps at no time in constitutional history has an adversary had such unrestrained power as to whom its opponent will—or will not—be, based simply upon the government's unreviewable discretion as to whom it will seek forfeiture against and whose attorneys' fees it will choose to withhold. *See Richardson-Merell, Inc.* v. *Koller*, 472 U.S. 424, 441 (1985) (Brennan, J., concurring) ("When a trial court mistakenly disqualifies a party's counsel as the result of an abusive disqualification motion, the court in essence permits the party's opponent to dictate his choice of counsel . . . . [T]his result is in serious tension with the premises of an adversary system . . . .").

Defendant's fundamental rights are thus wholly undermined by a statutory scheme which gives preferential treatment to the government's statutory right to forfeiture at the expense of defendant's Fifth and Sixth Amendment rights. Such a devaluing of defendant's rights in deference to Congressional prescription fatally misconceives the fundamental role of defense counsel in the proper functioning of the adversary system. Moreover, such an analysis totally ignores the government's ability to interfere with that constitutional function, literally at its whim. Given the potential for prosecutorial abuse or manipulation, such untrammeled veto power over the defendant's choice of counsel by an adversary is clearly intolerable. *See Rogers*, 602 F.Supp. at 1350.

Thus, where counsel may very well represent his client for several years over the course of preindictment investigations and grand jury proceedings (*e.g., Ianniello*), the government's well-nigh unreviewable power to secure exclusion of such counsel and place defendant's trial preparation in the hands of CJA counsel operating under the strictures of the Speedy Trial Act, seriously implicates defendant's right not only to counsel of choice and to effective assistance of counsel, but, as noted by Judge Oakes below (Pet. App. 8a-10a, 72a-76a), it also "shakes the very foundation of our criminal justice system."

Ultimately, therefore, restraint or forfeiture of *bona fide* attorneys' fees serves to undermine the very adversary system

itself, by producing an imbalance of powers that violates the due process clause of the Fifth Amendment. *See Wardius* v. *Oregon*, 412 U.S. at 474; *Rochin* v. *California*, 342 U.S. 165, 173 (1952) (due process requires criminal procedures which do not offend a "sense of justice"); *Gandy* v. *Alabama*, 569 F.2d 1318, 1321 (5th Cir. 1978) (defendant's due process protection includes "fair opportunity to be represented by counsel of his own choice").

The government, of course, denies the attempted arrogation of power to itself to determine its adversaries in criminal proceedings, arguing instead that, if a defendant is effectively rendered indigent upon the government's accusations, it is the defendant's own doing because he engaged in conduct which the government intends to prove is wrongful. But *cf. United States* v. *Unit No. 7*, 853 F.2d at 1451 (government restraining order a "preemptive strike" pauperizing a defendant and counsel prior to trial). Such circular reasoning cannot, however, obfuscate the dangers posed to our adversary system where the more serious the charges, the less likely that private counsel can be retained to provide necessary legal representation. *Thier*, 801 F.2d at 1476-77 (Rubin, J., concurring) ("The government should not be permitted to cripple the defendant at the outset of the struggle by depriving him of the funds he needs to retain counsel and to provide food for himself and his family. Even in the war against crime, due process forbids terrorism").

IV. THE STATUTE IS CONSTITUTIONALLY INFIRM AS IT DENIES ADEQUATE PROCEDURAL DUE PROCESS

As noted in the Petitioner's Brief in No. 87-1729, *Caplin & Drysdale, Chartered*, at 11-32, as well as the respective amicus briefs submitted by the American Bar Association (at 20-22); and The Association of the Bar of the City of New York, *et al.* (at 11-25), serious questions are raised as to the *ex parte* procedures by which post-indictment restraining orders may be secured and maintained in the absence of any sort of evidentiary hearing and what kind of post-restraint inquiry is appropriate. *See, e.g., United States* v. *Crozier*, 777 F.2d 1376, 1383-84 (9th Cir. 1985); *Thier*, 801 F.2d at 1466-69. Ordinarily, Congress' failure to provide for a necessary hearing in a statute does not preclude courts from imposing one in order to comport with the requirements of due process. 2A Sutherland, *Statutory Construction* §§ 45.11.-.12, at 33-34, 37-38 (4th ed. 1973).

Here, however, where the legislative history of a statute indicates that Congress specifically sought to circumvent the requirements of due process, *see* amicus brief of the Association of the Bar, at 12-14 (collecting legislative authorities), such a statute must necessarily fall as constitutionally infirm, as noted by Judge Miner in the court below (Pet. App. 24a-26a, relying, *inter alia*, on *Fuentes* v. *Shevin*, 407 U.S. 67 (1972)), or, alternatively, the Court must read such a post-seizure hearing requirement into the statute as matter of due process, as was done by Judge Winter in *Monsanto en banc* concurrence (Pet. App. 10a-20a). *See* Note, *RICO Post-Indictment Restraining Orders: The Process Due Defendants*, 60 N.Y.U. L. Rev. 1162 (1985) (and cases collected therein).

This, of course, once again raises the fundamental question as to which body—Congress or the Court—is the most appropriate to rule upon the specific elements of due process required as part of a post-seizure hearing. Should the Court not accept Judge Winter's balancing of the equities in providing a post-seizure hearing at which equitable principles are applied, then it may be germane to reconsider the *Caplin & Drysdale* court's suggestion that "this is not a debate which should be silenced through judicial fiat" (837 F.2d at 848-49) and declare the statute unconstitutional on Fifth Amendment procedural due process grounds, leaving it to Congress to supply those elements of due process that it previously refused to provide. *See, e.g., Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 339 (1969) ("[o]ur concern is not what philosophy Wisconsin should or should not embrace . . . We do not sit as a super-legislative body. In this case the sole question is whether there has been a taking of property without that process that is

required by the Fourteenth Amendment"); *Fuentes* v. *Shevin*, 407 U.S. at 96-97 ("[t]he nature and form of such prior hearings . . . are legitimately open to many potential variations and are a subject, at this point, for legislation—not adjudication"); *Freedman* v. *Maryland*, 380 U.S. 51, 60 (1965) ("[H]ow or whether Maryland is to incorporate the required procedural safeguards in the statutory scheme is, or course, for the State to decide").

Obviously, the Fifth Amendment due process clause compels a post-indictment pretrial adversarial hearing under the relevant restraining statute (21 U.S.C. § 853 (e)(1)(A)), which contains no explicit provision for an evidentiary hearing, contrary to its companion subsection 853(e)(1)(B). *See Crozier*, 777 F.2d at 1383-84.

In determining the factors required to be considered at such a hearing, besides those enumerated by Judge Winter in *Monsanto* (Pet. App. 10a-20a), the *Thier* court set up a broad Rule 65 test that provides great flexibility and latitude to enable the district court to tailor relief to the unique exigencies of each case (801 F.2d at 1470).[29]

Moreover, the extent of the restraint upon defendant's assets and the protracted period of time that such assets will remain seized are both factors that must be considered in balancing the government's statutory interests with the constitutional rights of the defendant. In discussing the complexity of the forfeiture

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[29] In a separate concurring opinion, Judge Alvin B. Rubin set a test that paralleled that provided by Judge Winter (801 F.2d at 1475, 1477):

> I would require the district court to permit the defendant access to sufficient funds to pay the reasonable costs of his defense and necessary living expenses for himself and his family unless the government can show a compelling reason why this should not be done.
>
> * * *
>
> I would set a standard that would guarantee the accused fundamental fairness in the resolution of his dispute with the government by assuring him minimal funds, reasonable in amount and subject to the court's scrutiny, to employ counsel and to pay living expenses until the government has proved its claim.

provisions contained in what has become the typical RICO or CCE indictment, one commentator has noted the genuine likelihood of erroneous deprivation of liberty and property:

> The procedure currently provided, however, invites error. The scope of the restraining order is determined by the terms of the indictment. In returning RICO indictments that often approach Rube Goldberg proportions, grand juries adopt unchallenged allegations of the extent of the defendant's property interests. The government seeks a restraining order based only upon the fact of the indictment or in conjunction with unchallenged supporting evidence. Given the complexity of the substantive and factual issues of a RICO prosecution, the risk that third parties will be erroneously deprived of their interests must be considered substantial.

Reed & Gill, *RICO Forfeiture, Forfeitable "Interests" And Procedural Due Process*, 62 N.C. L. Rev. 57, 80-81, 89 (1983).

Indeed, it is not merely the extent of the injunction that is prejudicial to the defendant, but the length of time that it is to remain in effect—the entirety of the trial in question. The defendant does not merely have his right to counsel of choice deferred—he has that right deprived permanently. *See* Note, *Due Process in Preliminary Proceedings Under RICO and CCE*, 83 Colum. L. Rev. 2068, 2081 (1983):

> The context in which liberty and property interests inevitably appear reinforces the conclusion that the private interests are extensive. The restraining order endures the full length of the criminal trial—the very time that the defendant or third party requires his or her full resources to muster bail and pay litigation costs. The enormous scope of the orders in the reported cases indicates that even the money necessary to meet day-to-day expenses may not be available to persons subject to a restraining order.
>
> * * *
>
> The length of a criminal trial through which a RICO or CCE order can endure should be compared with the relatively short-lived deprivations to which the Supreme Court has paid great deference. *See Fuentes* v. *Shevin*, 407

U.S. 67, 84-85 (1972) (provision for recovery of deprived property within three days); *Goldberg* v. *Kelly*, 397 U.S. 254, 259 n.5 (1970) (maximum length of wrongful deprivation 10 days); *Goss* v. *Lopez*, 419 U.S. 565-567 (1975) (10 day school suspension). RICO and CCE trials, by contrast, involve complex and difficult issues and may require months to conclude. *United States* v. *Spilotro*, 680 F.2d 612, 615 (9th Cir. 1982). This time lag itself indicates the magnitude of the interests involved.

Plainly, given this multiplicity of substantive factors warranting consideration at such a hearing—in addition to such other procedural factors never even considered by Congress, *e.g.*, burden of proof, standard of proof, applicability of the Federal Rules of Evidence, pretrial discovery, *Simmons-Kastigar* witness immunity, etc.—and it is axiomatic that the hearing provided should vest the district court with the maximum discretion to prevent the government from fatally intruding on defendant's fundamental constitutional rights. The procedural solution devised by Judge Winter provides a viable means of avoiding the constitutional dilemma posed by a restraining statute that is otherwise facially violative of procedural due process. Failing that, this Court has no other means of saving the statute but to render it unconstitutional, as suggested by Judge Miner (Pet. App. 24a-26a), leaving it to Congress to repair its imperfect handiwork.

CONCLUSION

The decision of the Court of Appeals for the Second Circuit *en banc* should be affirmed.

Respectfully submitted,

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Nos. 87-1729 and 88-454

In the Supreme Court of the United States

OCTOBER TERM, 1988

CAPLIN & DRYSDALE, CHARTERED, PETITIONER

v.

UNITED STATES OF AMERICA

UNITED STATES OF AMERICA, PETITIONER

v.

PETER MONSANTO

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE FOURTH AND SECOND CIRCUITS

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES

Pursuant to Rule 35.5 of the Rules of this Court, we respectfully file this supplemental brief to bring to the Court's attention the recent decision of the United States Court of Appeals for the Eleventh Circuit in *United States* v. *Bissell*, No. 87-8246 (Mar. 2, 1989).[1] The Eleventh

[1] We have lodged ten copies of the opinion in *Bissell* with the Clerk of this Court.

Circuit there rejected the defendants' contention that their convictions under the federal drug laws should be reversed because the pretrial restraint of assets under 21 U.S.C. 853(e)(1)(A) and (f) (Supp. IV 1986) prevented them from using restrained assets to hire a lawyer. The court addressed four issues that are relevant to the instant cases.

First, the court in *Bissell* concluded that "[t]he language and legislative history of section 853 evidence Congress' goal of reaching as many illegal assets as constitutionally permissible," and it therefore held that Section 853 "reaches all illegal funds, including those earmarked for payment to attorneys." On this point, the court expressly agreed with the decisions of the Fourth, Seventh, and Tenth Circuits in *Caplin & Drysdale*, *Moya-Gomez*, and *Nichols*.[2] Slip op. 1593.

Second, the court rejected the contention that the pretrial restraints deprived the defendants of an opportunity, protected by the Sixth Amendment, to retain counsel of their choice. Slip op. 1593-1595. As an initial matter, the court explained that the United States was not a mere creditor, for whom assets were restrained to secure payment of a debt owed to it by the defendants. Rather, the court stressed, by virtue of the provision in Section 853(c) that vests title in the United States as of the time the defendant commits the act giving rise to forfeiture, the indictment in *Bissell* effectively charged that "none of the defendants have ever owned any of these assets," because "[a]ll of the assets were the property of the government the moment they were derived from, or utilized in, the criminal activities condemned." Slip op. 1594. On this

[2] *In re Forfeiture Hearing As To Caplin & Drysdale*, 837 F.2d 637, 641-642 (4th Cir. 1988) (en banc), cert. granted, No. 87-1729 (Nov. 7, 1988); *United States* v. *Moya-Gomez*, 860 F.2d 706, 728 (7th Cir. 1988); *United States* v. *Nichols*, 841 F.2d 1485, 1491-1496 (10th Cir. 1988).

basis, the court found no Sixth Amendment violation. The court reasoned that the Sixth Amendment affords a defendant only "the opportunity to select his own counsel *at his own expense*," not the "right to use assets to the extent that those assets belonged to the United States." *Id.* at 1594-1595 (emphasis in original; citation omitted). The fact that a defendant cannot afford private counsel as a result of the operation of Section 853 "is of no Sixth Amendment significance," the court concluded, because "a defendant may not insist on representation by an attorney he cannot afford," and because his fundamental right to the assistance of counsel will be protected through appointment of counsel, if necessary. *Id.* at 1595.

Third, applying the four-part test of *Barker* v. *Wingo*, 407 U.S. 514 (1972), and *United States* v. *$8,850*, 461 U.S. 555 (1983), the Eleventh Circuit held in *Bissell* that the defendants' due process rights were not violated by the postponement of a post-restraint hearing until the criminal trial itself. Slip op. 1595-1598. The court reasoned that: (1) the eight-month period between the imposition of restraints and the trial was not excessive (slip op. 1597); (2) there were substantial reasons for not holding a full-blown hearing on the merits of the government's case until trial, because of the potential for jeopardizing the safety of witnesses and premature disclosure of the government's case (slip op. 1597); (3) the defendants did not contend that the seizures and other restraints were unsupported by probable cause or applied to assets beyond the scope of the indictment (slip. op. 1597-1598); and (4) the effect of the restraints on the defendants' Sixth Amendment interest in retaining counsel of their choice must be considered in light of the United States' claim of title to the same assets and the district court's exercise of control through its issuance of restraining orders or seizure warrants, which provide a significant check on the government's power to

restrain legitimate assets (slip op. 1598-1599, citing *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974)).

Fourth, following the reasoning in *Caplin & Drysdale*, 837 F.2d at 648, and *Nichols*, 841 F.2d at 1508, the Eleventh Circuit held that the mere possibility of prosecutorial abuse does not render the forfeiture statute itself unconstitutional. In the court's view, any allegations of abuse can be adequately considered in the circumstances of a particular case. Because no prosecutorial bad faith was evident in *Bissell* and because the district court had made a determination of probable cause, either on its own or upon the grand jury's return of the indictment, the Eleventh Circuit found no improper denial of the defendants' qualified Sixth Amendment right to the assistance of counsel of their choice. Slip op. 1599-1600.

Respectfully submitted.

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MARCH 1989

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REPLY

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CORRECTED COPY

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REPLY BRIEF OF THE RESPONDENT

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I.

THE RIGHT TO RETAIN COUNSEL OF CHOICE, THE PRIMARY RIGHT PROTECTED BY THE SIXTH AMENDMENT, IS A FUNDAMENTAL RIGHT REQUIRING STRICT SCRUTINY

The government fails altogether to address our contention that the history of the Sixth Amendment demonstrates that it was designed to protect the right of the defendant to use his assets to retain counsel of his choosing. *See* Resp. Br. 32; NACDL Br. 13-16. The Sixth Amendment rejects the prior English practice of denying a defendant the opportunity to appear with counsel in felony and treason cases. At the time of the adoption of the federal Constitution, the constitutions of the respective states guaranteed "that a defendant is not to be denied the privilege of representation by counsel of his choice." *Betts* v. *Brady*, 316 U.S. 455, 468 (1942). It was thus protection of the right to counsel of choice that the Sixth Amendment contemplated when it guaranteed the right of the accused "to have the Assistance of counsel for his defence." U.S. Const. Amend VI. *See* Winick, *Forfeiture of Attorneys' Fees Under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It*, 43 Univ. Miami L. Rev. 101, 121-34 (March 1989) (forthcoming).[1] As the most important criminal trial of the colonial era—the trial of John Peter Zenger—demonstrates, the right to appear with the defendant's chosen champion, rather than one appointed by the court, is the model the framers had in mind. It was not until 1938 that the Sixth Amendment was read *also* to

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[1] Page-proofs of the Winick Law Review article have been placed on file with the Clerk's Office so that it may be available to the Members of the Court.

guarantee the right to appointed counsel. *Johnson* v. *Zerbst*, 304 U.S. 458 (1938).

The right of the defendant to use his own funds to obtain counsel of choice is thus a fundamental right. When the government acts, as it does here, to deprive the defendant of assets that he otherwise would use to exercise this fundamental right, its actions must meet the test of strict scrutiny.

The Government seeks to denigrate the right to retain counsel of choice by its reliance on language in this Court's recent decision in *Wheat* v. *United States*, 108 S.Ct. 1692 (1988). The holding in *Wheat*—that a defendant could not choose representation by an attorney found to be subject to an actual conflict of interest—does not resolve the discrete question of whether the Government may deprive a defendant of the opportunity to select *any* private counsel, let alone one subject to a disqualifying condition such as conflict of interest.

The question raised by the forfeiture statutes is not whether exercise of the right to counsel of choice can be regulated, such as by restrictions on the choice of a counsel who is otherwise engaged in order to prevent undue delay, or on the choice of an attorney disqualified by a factor such as a conflict of interest. Rather, it is whether the right may be completely destroyed by governmental action that renders the defendant unable to choose any private counsel. The balance struck in *Wheat*, between the need to preserve the appearance of fairness and the ethical standards of the profession, on the one hand, and the defendant's interest in choosing a particular counsel, on the other, concededly comes at the expense of the values underlying the right to counsel of choice. The effect on these values that results from requiring the defendant

to appear through his second choice of attorneys rather than his first, however, must be regarded as marginal.

There is a vast difference between overriding a defendant's choice of a particular lawyer and preventing him from employing any lawyer at all. The latter subverts many important values underlying the Sixth Amendment: diminishing the potential for trust and confidence that are essential to a meaningful attorney-client relationship, depreciating respect for individual choice and autonomy that serve as a basic premise of the right, undermining the defendant's sense of participation in the proceedings, thereby both lessening its appearance of fairness and his ability to accept its outcome, and ultimately jeopardizing public confidence in the administration of justice. For all these reasons, the balancing approach employed in *Wheat* for measuring the effect of the minor regulation of the exercise of the Sixth Amendment right at issue in that case should be rejected here in favor of the more stringent scrutiny mandated when fundamental constitutional rights are totally abrogated.

Fee forfeiture presents a problem quite distinct from the more limited intrusions of the Sixth Amendment involved in prior counsel of choice cases. Typically, cases that deal with the right to counsel of choice involve questions of continuances to enable the defendant to retain or substitute counsel, or to allow his chosen counsel to be available, or judicial attempts to restrict the defendant's choice of counsel because chosen counsel labors under a conflict of interest or is not a member of the bar of the court. These judicial attempts involve regulations on the exercise of the right, not its total abridgment. Yet, even in these contexts, the courts have protected the right to counsel of choice from any "unnecessary or arbitrary" interference, holding that it will yield only when required

by the "fair and proper administration of justice." *See, e.g., United States* v. *Panzardi Alvarez*, 816 F.2d 813, 817 (1st Cir. 1987); *United States* v. *Rankin*, 779 F.2d 956, 958 (3d Cir. 1986); *United States* v. *Lewis*, 759 F.2d 1316, 1326 (8th Cir. 1985); *United States* v. *Laura*, 607 F.2d 52, 56 (3d Cir. 1979); *Winick, supra*, at 148.

Unlike these trial-related instances in which the defendant's right to particular counsel of choice is balanced against the demands of the efficient administration of justice, the RICO and CCE forfeiture provisions involve governmental action to strip a defendant of all his assets, thereby completely precluding his ability to retain any private counsel. A higher level of scrutiny therefore should be applied.

Moreover, the Government fails to address our contention that the First Amendment is an independent source of constitutional protection for the right of a defendant to retain counsel of choice "to assist in the assertion . . . of legal rights." *United Mine Workers* v. *Illinois Bar Assn.*, 389 U.S. 217, 222 (1967); Resp. Br. 34 n.16; NACDL Br. 49-50; Winick, *supra*, at 153-67.

Both Sixth and First Amendment principles thus compel that the burden of justification required for this total abridgement should be framed in terms of the usual test of scrutiny invoked whenever fundamental constitutional rights are violated, requiring a compelling governmental interest and the use of least restrictive means. Winick, *supra*, at 168. Congress' expressed objectives—to deprive criminal organizations of their economic power bases in order to prevent such organizations from continuing their criminal activities; and to prevent the concealment or fraudulent transfer of assets to third-parties in order to frustrate forfeiture—are fully met without requiring forfeiture of legitimate as opposed to "sham" or "fraudulent" attorneys' fees.

Freeing legitimate attorneys' fees from forfeiture does not permit the defendant "to retain his ill-gotten economic power after conviction," nor "to shelter untainted assets by paying a lawyer with tainted property first." *United States* v. *Monsanto*, 852 F.2d 1400, 1403 (2d Cir. 1988) (*en banc*) (Feinberg, C.J., concurring). Although it will permit defendants who later are found guilty to use what turns out to have been ill-gotten economic power to hire an attorney, the legitimate governmental interests in preventing such use are small. The Government's legitimate interest in deterring crime is met, as the prospect of hiring an attorney with the proceeds of crime alone does not provide an incentive to commit crime. *United States* v. *Thier*, 801 F.2d 1463, 1474-75 (5th Cir. 1986), *modified on other grounds*, 809 F.2d 249 (1987). The Government's legitimate interest in punishing crime is not implicated, as punishment constitutionally may be imposed only after conviction. The Government's legitimate interest in preventing the proceeds of crime from being used to fuel additional crime either by the defendant or a criminal organization with which he is associated is fully satisfied. The Government's interest in forfeiture is not to raise revenue; therefore, the government may not assert a financial interest in attorneys' fees. *Monsanto*, 852 F.2d at 1407 (Winter, J., concurring). Nor may the Government assert a legitimate interest in the adversarial advantage it will gain by preventing the defendant from hiring his chosen counsel. *Id.* at 1403 (Feinberg, C.J., concurring). As a result, the interest in preventing the use of "ill-gotten economic power" to hire attorneys is "weak" in the context of *bona fide* fees and cannot outweigh the defendant's constitutional right to counsel of choice. *Id.* The "small societal cost" of exempting such bona fide fees from forfeiture "is the price we must pay for protecting the rights of the innocent, who might otherwise be deprived of legitimate economic power in waging a full defense." *Id.*

Applying the forfeiture statutes to legitimate attorneys' fees will not promote the predominant Congressional interest asserted in the legislative history of the 1984 amendments—the avoidance of fraudulent transfers. So long as it can be assured that the fee paid to the attorney is a *bona fide* and reasonable one, rather than a sham or fraudulent transfer designed to avoid forfeiture, Congress' stated purpose is not frustrated. Indeed, expenditure of legitimate attorneys' fees from defendants' assets would serve Congress' interest in stripping drug dealers and racketeers of their "economic power bases."

One of the primary reasons to strip criminals and their organizations of their "economic power bases" is to prevent the profits of crime from being used to sustain the criminal enterprise, even after the conviction of individual members. The use of otherwise forfeitable assets to pay legitimate attorneys' fees does not frustrate this interest, but instead furthers it. Funds that the defendant pays to his attorney for his services are thereafter unavailable to the defendant or to any criminal organization to which he may belong. The congressional interest in deterring crimes by depriving criminals of the economic incentives to engage in them therefore would be fully satisfied without applying the forfeiture provisions to legitimate attorneys' fees.

As a result, because the interests asserted by Congress in support of the forfeiture provisions are not furthered by the forfeiture of legitimate as opposed to sham or fraudulent attorney's fees, application of the forfeiture provisions to such fees is gratuitous and unnecessary. Whatever the result would be if Congress were to seek to further other compelling interests through forfeiture, the application of the forfeiture provisions of RICO and CCE to legitimate attorneys' fees constitutes an arbitrary and

unreasonable intrusion on the defendant's right to counsel of choice and should be held unconstitutional.

The government's argument seeks to confound the separate and distinct right to retain counsel of choice with the right to appointed counsel. The right to appointed counsel, no matter how effective, cannot satisfy the interest underlying the right to retain counsel. As this Court recognized in *Faretta* v. *California*, 422 U.S. 805 (1975), granting a defendant the right to an appointed counsel will not satisfy the separate Sixth Amendment right to self-representation. For similar reasons, as the circuit courts have recognized, providing appointed counsel will not satisfy deprivation of the right to retain counsel of choice. *E.g.*, *United States* v. *Romano*, 849 F.2d 812, 820 (3d Cir. 1988); *accord United States* v. *Panzardi Alvarez*, 816 F.2d 813, 816 (1st Cir. 1987); *United States* v. *Diozzi*, 807 F.2d 10, 16 (1st Cir. 1986); *United States* v. *Rankin*, 779 F.2d 956, 960-61 (3d Cir. 1986); *Wilson* v. *Mintzes*, 761 F.2d 275, 285-86 (6th Cir. 1985); *United States* v. *Lewis*, 759 F.2d 1316, 1326-27 (8th Cir.), *cert. denied*, 474 U.S. 994 (1985); *United States* v. *Ray*, 731 F.2d 1361, 1355 (9th Cir. 1984); *Linton* v. *Perini*, 656 F.2d 207, 211-12 (6th Cir. 1981); *United States* v. *Laura*, 607 F.2d 52, 58 (3d Cir. 1979); *Gandy* v. *Alabama*, 569 F.2d 1318, 1323-25 (5th Cir. 1978); *United States ex rel. Ferenc* v. *Brierley*, 320 F.Supp. 406, 409 (E.D. Pa. 1970); Stacy & Dayton, *Rethinking Harmless Constitutional Error*, 88 Colum. L. Rev. 79, 111 n.132 (1988).

The right to counsel of choice serves participatory and autonomy values independent of the interest in truth-seeking, just as does the right to self-representation recognized in *Faretta*. *See* Winick, *supra*, at 135-41. The Government's argument, if accepted, would read the right to retain counsel of choice out of the Constitution.

II.

IN THE ABSENCE OF A CLEARLY EXPRESSED CONGRESSIONAL INTENT TO INCLUDE LEGITIMATE ATTORNEYS' FEES WITHIN THE AMBIT OF "PROPERTY" SUBJECT TO FORFEITURE, A NARROW CONSTRUCTION OF THE STATUTE EXCLUDING SUCH FEES IS REQUIRED BY THE CANON OF STATUTORY CONSTRUCTION THAT COUNSELS AVOIDANCE OF UNNECESSARY CONSTITUTIONAL ADJUDICATION.

The Government's brief is noteworthy for its failure to come to grips with our argument based upon the prudential principles reflected in *N.L.R.B.* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1970). *See* Resp. Br. at 18-23; NACDL Br. 58 *passim;* Winick, *supra*, at 173-86. In a single footnote, the Government seeks to avoid the force of this argument by suggesting, without rebutting our argument to the contrary, that the statutory language and legislative history are clear (Gov. Br. 37 n.32).

At the very least, application of the forfeiture statutes to legitimate—as opposed to "sham" or "fraudulent"—attorney's fees raises extremely serious constitutional questions. Under the "traditional rule" followed in *Catholic Bishop, see DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 108 S.Ct. 1392, 1398, (1988), where such "serious constitutional questions" are raised concerning an asserted interpretation of a statute, the Court "must first identify 'the affirmative intentions of the Congress clearly expressed' before concluding that the Act" applies. 440 U.S. at 500.

Here, as in *Catholic Bishop*, although the statute uses "very broad terms" (*id.* at 504), it does not explicitly cover attorneys' fees. Moreover, the exemptions for *bona fide* purchasers "reasonably without cause to believe that the property was subject to forfeiture" (21 U.S.C. §

853(n)(6)(B)) may properly be read to express an intent that an attorney's necessary knowledge that his client's property may be subject to forfeiture should not disqualify him from this exemption. *See* NACDL Br. at 67-73; Winick, *supra*, at 179-83.[2]

In addition, the legislative history also fails to provide the needed "affirmative intention clearly expressed." 440 U.S. at 500. The legislative history demonstrates that Congress did not contemplate the application of the statute to legitimate as opposed to fraudulent attorneys' fees. The footnote in the House Report that we rely on constitutes an express disclaimer that the statute be interpreted "to interfere with a person's sixth amendment right to counsel." H.R. Rep. No. 845, 98th, Cong., 2d Sess., Pt. I, at 19 n.1 (1984); *See* Resp. Br. at 14-15 n.8; NACDL Br. at 77-79; Winick, *supra*, at 184-185. The

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[2] The Government, however, takes the diametrically opposing view by implying that attorneys could virtually *never* qualify as *bona fide* purchasers under the statute because, given the nature of the attorney-client relationship, it would be well-nigh impossible for an attorney—in the course of representing his client—to demonstrate that he was "reasonably without cause to believe that the property [he has or had already received as a fee] was subject to forfeiture" (Gov. Br. at 22-25). Such an interpretation of the statute would thus mean that of all potential third-parties, defense attorneys would be singled out as those who could *never* qualify to represent criminal defendants whose assets have been seized.

Accordingly, under the Government's interpretation of the statute's *bona fide* purchaser provisions, criminal defense counsel, rather than receiving *greater* protection under the criminal forfeiture statute, would be singled out to receive even less. There is, quite simply, no basis in the legislative history to support the Government's interpretation. Our construction of the "reasonably without cause" language is, by contrast, consistent with both the language and the intent of the 1984 amendments.

Senate Report reflects a concern limited to "sham" transfers "that were not 'arm-length' transactions." S. Rep. No. 98-225, at 200-01, 209 n.47. *See* Resp. Br. at 13-14; NACDL Br. at Br. 79-80; Winick, *supra*, at 185.

At the least, the legislative history fails to demonstrate a "clear expression of an affirmative intention of Congress" (*Catholic Bishop*, 440 U.S. at 504) to subject *bona fide* attorneys' fees to forfeiture. The fairest conclusion here, as in *Catholic Bishop*, is that "Congress simply gave no consideration" (*Catholic Bishop*, 440 U.S. at 504) to the application of these provisions to legitimate attorneys' fees. Indeed, in *United States* v. *Nichols*, 841 F.2d 1485, 1489 & n.6 (10th Cir. 1988), the Tenth Circuit conceded that its thorough examination of the legislative history indicated that Congress had simply failed to consider the issue.[3]

That being the case, and there being an absence of a clear expression of congressional intent—either in the

[3] The government's reliance on *United States* v. *Long*, 654 F.2d 911 (3d Cir. 1981), is misplaced. *Long* represented a case of a "sham" or "fraudulent" transfer, as opposed to a legitimate one. The court intimated that the attorneys who received the airplane in question may have been involved in a scheme to avoid forfeiture because the bulk of the sale price for the airplane was a retainer for unperformed legal services and the attorneys gave some cash to the defendant, who then became a fugitive. *Long* did not address whether the government could forfeit *bona fide* attorneys' fees for services rendered in those same criminal proceedings. Instead, *Long* is simply an example of a court issuing a restraining order to ensure that it was not automatically divested of its authority to order forfeiture by the defendant's transfer of assets to a third party. *See United States* v. *Rogers*, 602 F. Supp. 1332, 1350 (D. Colo. 1985). *Accord*, *United States* v. *Harvey*, 560 F. Supp. 1040, 1085 (S.D. Fla. 1982). (*Long* was decided "on the ground that the transfer was a ruse intended to thwart the criminal forfeiture penalty intended by Congress.") Because *Long* involved an arguably sham transfer, its citation in the legislative history can provide no indication that Congress intended to subject *legitimate* legal fees to forfeiture.

language of the statute or the legislative history—to apply the forfeiture provisions to legitimate attorneys' fees, *Catholic Bishop* compels the result that the forfeiture statutes not be deemed applicable to legitimate attorneys' fees. Accordingly, this Court should avoid the constitutional dilemma posed by the Government's artificial interpretation of the statute by invoking the traditional canon of statutory construction that avoids constitutional questions unless and until they are unambiguously posed by Congress. Thus, this Court should apply the prudential approach of *Catholic Bishop* to exempt attorneys' fees from forfeiture in the absence of an explicit and clearly expressed Congressional mandate to the contrary.[4]

[4] The government suggests that it is unnecessary to reach the merits of respondent's procedural due process argument in light of the purported "propriety" of the *Monsanto*-panel directed hearing—held prior to *en banc* review. This is incorrect for several reasons. In the first place, the *en banc* court rejected the two-pronged test for such a hearing that had been jerry-built by the divided panel—(1) probable likelihood of conviction and (2) probable forfeiture of restrained assets. Repeatedly, this Court has held that where the trial court applies an erroneous standard of law in dealing with a fact-related issue, reversal is required so that the correct legal standard may be applied and so that facts may be properly developed without being infected by analysis under an improper legal standard. *See, e.g.*, *Rogers* v. *Richmond*, 365 U.S. 534, 547 (1961) ("Nor . . . can . . . findings be fairly looked to for the 'facts,' since findings of fact may often be . . . influenced by what the finder is looking for. Historical facts 'found' in the perspective framed by an erroneous legal standard cannot plausibly be expected to furnish the basis for correct conclusions if and merely because a correct standard is later applied to them.").

Second, serious questions were raised on *en banc* review as to the propriety of the legal standard applied by the panel—the panel's refusal to apply the standards of Rule 65, F.R.C.P. and *United States* v. *Thier*, 801 F.2d 1463 (5th Cir. 1986); the "clear and convincing

CONCLUSION

The decision of the Court of Appeals for the Second Circuit *en banc* should be affirmed.

Respectfully submitted,

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March 1989

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evidence" standard as the appropriate burden of proof; the propriety of *Simmons—Kastigar* immunity as to the testimony of the defendant; the applicability of the Federal Rules of Evidence and the government's use of uncorroborated hearsay; and, finally, the conflict of interest between attorney and client at such a hearing. None of these questions was reached by the *en banc* court because the tribunal did not consider—nor did it have before it for review—the district court hearing minutes of the *Monsanto* trial proceedings. The *en banc* court limited its consideration merely to the legal standard set forth by the panel decision, not the findings of fact and conclusions of law of the district court. Given its determination that the panel decision set forth an incorrect legal standard, the *en banc* court never addressed —or even had before it—the findings of the district court at the original hearing held on the panel's remand.

Accordingly, considering that the *en banc* court never reviewed the district court's findings—based upon its determination that the lower court had been directed to apply an incorrect legal standard—those findings are not properly ripe for review at this time.

AMICUS CURIAE

BRIEF

Nos. 87-1729 and 88-454

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CAPLIN & DRYSDALE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,

v.

PETER MONSANTO,
Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Second Circuits

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BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF THE PETITIONER CAPLIN & DRYSDALE IN NO. 87-1729 AND THE RESPONDENT MONSANTO IN NO. 88-454

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

Nos. 87-1729 and 88-454

CAPLIN & DRYSDALE,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,
v.
PETER MONSANTO,
Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Second Circuits

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BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF THE PETITIONER CAPLIN & DRYSDALE IN NO. 87-1729 AND THE RESPONDENT MONSANTO IN NO. 88-454

INTEREST OF THE AMICUS CURIAE

The American Bar Association (the "ABA") is a voluntary national organization of the legal profession. With a membership of more than 347,000 individuals from every state and territory, its constituency includes prosecutors, public defenders, private lawyers, trial and appellate judges, legislators, law enforcement and correc-

tions personnel, law students, and a number of non-lawyer "associates" in allied fields. From its inception more than 100 years ago, the ABA has taken an active interest in promoting the availability and effectiveness of counsel in our adversary system of criminal justice. Because the right to counsel and the preservation of an adversarial system of criminal justice are matters central to the administration of justice, the ABA seeks to appear as amicus curiae.

These cases raise the fundamental question of whether fees paid to a defense attorney rendering legitimate services in a criminal case should be subject to criminal forfeiture. The ABA recognizes that the government has a legitimate interest in the forfeiture of assets obtained through criminal activity. Nevertheless, the ABA opposes pre-trial restraints on the payment of bona fide atorneys' fees or the post-trial forfeiture of bona fide attorneys' fees absent reasonable grounds to believe that the fee payments are a mere sham or fraudulent transfer to protect a defendant's assets from forfeiture.

After Congress enacted the Comprehensive Forfeiture Act of 1984 (the "CFA"), the ABA carefully examined the impact of the enhanced forfeiture laws on our criminal justice system. Based on a report submitted by the Criminal Justice Section on July 9, 1985, the ABA House of Delegates adopted a resolution stating:

> That the American Bar Association disapproves of the use of the forfeiture provisions of the Comprehensive Crime Control Act of 1984, and subpoenas issued pursuant thereto, directed to attorneys actively representing defendants in such criminal cases, in the absence of reasonable grounds to believe that an attorney has engaged in criminal conduct and/or has accepted a fee as a fraud or a sham to protect the illegal activity of a client.

ABA, Reports with Recommendations to the House of Delegates, Report No. 108A (July, 1985).

In August of 1986, the ABA adopted a further resolution, again accompanied by a Criminal Justice Section Report, stating:

> That the American Bar Association disapproves of the use of statutory forfeiture provisions in pretrial and other orders to prevent a defendant from paying counsel of choice or paying other expenses incident to presenting an effective defense, in the absence of reasonable grounds to believe that these payments constitute a sham, fraud, or criminal conduct.

ABA, Reports with Recommendations to the House of Delegates, Report No. 136A (August, 1986).

In furtherance of these declared policies, the ABA appears in these cases to voice its opposition to fee forfeiture and to underscore the deleterious impact that forfeiture of bona fide attorneys' fees will have on our system of criminal justice.

SUMMARY OF ARGUMENT

Application of the forfeiture provisions of the CFA to legitimately earned attorneys' fees would bring about a fundamental restructuring of our adversary system of criminal justice and threaten core constitutional values which lie at the heart of the guarantee to a fair trial. The fee forfeiture provisions potentially apply to 25% of the criminal cases brought in federal court, including all drug, obscenity and money-laundering offenses. Yet, the sweeping consequences spawned by application of the forfeiture provisions in this context would be the unintended result of a statute clearly aimed elsewhere.

The relation-back doctrine at issue in this case was intended only to prevent sham transactions in anticipation of forfeiture. Ironically, legitimate attorneys' fees are swept into the statutory scheme only because of the special nature of the attorney-client relationship. Unlike any other legitimate provider of pre-conviction services

to the defendant, the criminal defense attorney is required to seek out information on the charges against his client. Yet, acquiring the information necessary to conduct a competent defense is precisely what makes the attorney vulnerable to fee forfeiture, because the lawyer is almost by definition on notice that the client's property may be subject to forfeiture. The privileged, confidential relationship between attorney and client, which is so central to due process protections for the criminally accused, is therefore seriously undermined by the threat of fee forfeiture.

Nothing in the legislative history of the CFA remotely suggests that Congress intended this result. Basic principles of statutory construction dictate that the statute should be construed to avoid the grave constitutional difficulties that forfeiture of legitimately earned attorneys' fees would cause.

Moreover, even if Congress had explicitly included legitimate attorneys' fees within the CFA, the Constitution would prohibit this gross governmental interference with the rights of the accused. The Sixth and Fifth Amendments independently mandate that the CFA be held unconstitutional as applied to legitimately earned attorneys' fees. The forfeiture of assets necessary to pay such fees violates the Sixth Amendment by interfering with the defendant's right to counsel of choice. Pretrial restraints on the payment of bona fide attorneys' fees, as a practical manner, will prevent the defendant from using his assets to hire counsel of choice even before his guilt or innocence has been adjudicated or any verdict of forfeiture concerning those assets has been rendered. The specter of forfeiture not only could deter counsel from undertaking a representation in the first instance but could force existing counsel to withdraw. Besides the risk of non-payment, defense counsel would confront ethical rules against accepting representation in which payment is contingent upon the outcome of trial. The

government can demonstrate no countervailing interest sufficiently compelling to justify this substantial infringement on the defendant's constitutional right to choose counsel.

Moreover, fee forfeiture creates a disincentive for defense counsel to learn information about his client's activities because this might imperil counsel's ability to make the required statutory showing that he had no knowledge that the client's assets were forfeitable. The conflict thus created between the lawyer's duty to prepare the case as thoroughly as possible and his efforts to retain his fee will undermine the defendant's unqualified right to effective assistance of counsel. On a more general level, the practice of fee forfeiture will deter counsel from accepting representation in complex criminal cases and thus may inhibit the education and development of qualified defense attorneys, a prospect of institutional concern to the ABA.

In addition, fee forfeiture violates the Fifth Amendment guarantee of due process in that it affords the government unparalleled control over a defendant's ability to defend himself prior to an adjudication of guilt, thus compromising the right to a fair trial that is the cornerstone of our criminal justice system. Prior restraints on bona fide attorneys' fees allow the government to force withdrawal of retained counsel at a time of its choosing, merely by making unproved allegations of forfeiture in the indictment or by seeking pre-trial restraint of assets. Thus, fee forfeiture will vest the government with a powerful new weapon—significant control over the resources of the defendant, his selection of counsel, and the means by which an accused presents his criminal defense. This unprecedented intrusion into the attorney-client relationship is incompatible with our adversary system of criminal justice.

For all of these reasons, the ABA believes that pretrial restraints on fees and the threat of possible forfeiture after trial infringe upon a defendant's Sixth and

Fifth Amendment rights. In light of these serious constitutional problems, and in the absence of an unequivocal expression of Congressional intent to authorize fee forfeiture, the ABA urges this Court to construe the CFA narrowly so as not to encompass the forfeiture of bona fide attorneys' fees.

ARGUMENT

I. THE CFA DOES NOT AUTHORIZE THE FORFEITURE OF BONA FIDE ATTORNEYS' FEES PAID TO DEFEND THE ACCUSED IN A CRIMINAL CASE.

It must be acknowledged at the outset that the forfeiture provisions of the CFA, on their face, broadly cover all property derived from alleged criminal activity and contain no specific exemption for property used to pay bona fide attorneys' fees. Yet this Court has ample discretion to construe the statute to avoid results that are both constitutionally unsound and unintended by Congress. Criminal defense attorneys are the only providers of legitimate pre-conviction services whose relationship with the accused is constitutionally protected. At the same time, and precisely because of that constitutionally protected relationship, they are also the only providers of legitimate pre-conviction services whose fees would be routinely subject to forfeiture. Nothing in the legislative history or the statute itself suggests that Congress intended this anomalous result. Moreover, fundamental principles of statutory construction require that the statute be construed to avoid the profound constitutional difficulties that forfeiture of legitimately earned attorneys' fees would cause.

The Comprehensive Forfeiture Act of 1984,[1] was enacted to correct specific deficiencies in existing crim-

[1] The Comprehensive Forfeiture Act was enacted as Chapter III of the Comprehensive Crime Control Act of 1984, P.L. No. 98-473, §§ 301-322, 98 Stat. 1837 (1984).

inal forfeiture law. The "relation back" doctrine, on which the government relies here, was specifically intended to prevent fraudulent pre-conviction transfers to avoid forfeiture. In order to further the punitive purpose of depriving convicted criminals of the fruits of their crimes, *see United States v. Unit No. 7 and Unit No. 8*, 853 F.2d 1445, 1451 (8th Cir. 1988); *United States v. Lizza Industries*, 775 F.2d 492, 498 (2d Cir. 1985), the statute provides that "All right title and interest in property . . . [subject to forfeiture] vests in the United States upon commission of the act giving rise to forfeiture." 18 U.S.C. § 1963(c); 21 U.S.C. § 853 (c). The intent was to reach preconviction transfers "to third parties acting as nominees or who have *knowingly* engaged in sham or fraudulent transactions." S. Rep. No. 225, 98th Cong., 2d Sess. 200, 209 n.47 (1984). These transactions do not include "arms length transactions" by the defendant with third parties. *Id.* at 201.

The relation-back doctrine therefore has no effect on most legitimate pre-conviction transfers, because the rights of bona fide purchasers for value—that is, anyone who received payment for goods or services from the accused without knowledge or "cause to believe" that the property would be subject to forfeiture—are specifically protected.[2] If applied to bona fide legal fees, that standard would either be a nullity that could never be satisfied or it would fundamentally and improperly undermine the attorney-client relationship. The criminal defense attorney is in a unique position because the very nature of

[2] Under the CFA, a court is authorized to grant post-trial relief from a forfeiture order to those who received assets from the defendant who either had a superior claim of title at the time of the criminal offense or who is "a bona fide purchaser for value of the right, title, or interest in the property [who] was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture." 18 U.S.C. § 1963(*l*)(6)(B); 21 U.S.C. § 853(n)(6)(B).

his services will often, and perhaps inevitably, entail knowledge of the possibility of forfeiture.

Unlike other persons who may do business with the accused, the defense attorney has a professional obligation to learn as much as possible about the actual and potential allegations against his client, including allegations that may ultimately lead to forfeiture. A threatened charge and an actual indictment would certainly provide some "notice" of potential forfeiture, but it is in those circumstances that an accused is most intensely in need of counsel of his own choosing in whom he may confide without reservation. Indeed it is a fundamental precept of our adversary system that full disclosure and complete confidence between attorney and client are essential to adequate representation. Thus, counsel's efforts to investigate the charges against his client will almost inevitably lead him to have some knowledge of the basis of the government's forfeiture allegations. Much of this information may be obtained through privileged communications; the rest may be attorney work product. The CFA and its legislative history disclose no legislative intent to discourage lawyers from representing persons suspected or accused of covered crimes, or to interfere with counsel's duty to become thoroughly familiar with the facts surrounding the government's case.

The absence of specific legislative guidance on the restraint or forfeiture of attorney's fees is persuasive evidence that Congress did not intend to precipitate dramatic changes in the adversary system or a defendant's right to counsel. The sole passage addressing the restraint and forfeiture of attorneys' fees is found in a House Report on a separate unenacted forfeiture bill. *See* H.R. Rep. No. 845, part 1, 98th Cong., 2d Sess. 19 n.1 (1984) (Report on Comprehensive Drug Penalty Act of 1984).[3] The extent of the legislative discussion on this

[3] The Comprehensive Drug Penalty Act, H.R. 4901, was passed by the House in 1984 and referred to the Senate. Although this bill was not acted upon by the Senate, many of its provisions were similar to the subsequently enacted Chapter III of the Comprehensive Crime Control Act.

question is limited to the statement that: "Nothing in this section is intended to interfere with a person's Sixth Amendment right to counsel."[4] No historical evidence exists to suggest that Congress intended the CFA to effect a dramatic shift in the traditional balance of power between adversaries in our criminal justice system.

Of course, if the government demonstrates that counsel engaged in a fraudulent or sham transaction to evade forfeiture, a different result would obtain. Congress intended to reach 'third parties . . . who have knowingly engaged in sham or fraudulent transactions." S. Rep. No. 225, at 209 n.47.[5] Here the government has not challenged the bona fide character of the disputed attorneys' fees and this question, thus, is not at issue.

A construction of the statute excluding bona fide attorneys' fees also is necessary to avoid a multitude of serious constitutional infirmities. A cardinal principle of statutory construction requires that courts "first ascertain whether a construction of the statute is fairly

[4] H.R. Rep. No. 845, part 1, at 19 n.1. The House Judiciary Committee therefore declined to resolve the prior conflict in district court opinions on the use of restraints impinging on counsel fees. *Id.*

[5] In addition, the 1984 Act provides other sanctions that a court might invoke where there is reason to believe that an attorney is assisting the defendant in a sham or fraudulent transfer of his assets. The "alternative fine" provided by Congress in 1984, *see* 18 U.S.C. 1963(a); 21 U.S.C. § 853(a), permits the court to impose a fine of up to twice the defendant's criminal profits, thus enabling the court to deal severely with any attempt by the defendant to shield his assets through an improper use of the attorney-client relationship. Similarly, if defense counsel particiaptes in such a scheme to assist the defendant in defrauding the government, the government will have recourse against defendant and defense counsel alike.

possible by which [a constitutional] question may be avoided."[6] *Crowell v. Benson*, 285 U.S. 22, 62 (1932). Moreover, as this Court has held, if the construction of the plain language of a statute presents a significant risk that constitutional rights will be infringed, such a construction must be supported by a "clear expression of an affirmative intention of Congress." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 504 (1979). In the absence of such unequivocal Congressional intent, this Court has not hesitated to construe statutes in a manner that would avoid reaching difficult constitutional issues. *Id.* at 507.

As succeeding sections of this brief explore, the use of the forfeiture provisions to reach bona fide legal fees would raise constitutional questions of sufficient magnitude as to invoke these principles. Fee forfeiture and pre-trial restraints on fees implicate serious questions under the Fifth and Sixth Amendments. And neither the CFA itself, nor its legislative history, contains any clear expression of a Congressional intent to bring bona fide attorneys' fees within the reach of the criminal forfeiture laws. Indeed, Congressmen intimately involved with the passage of the CFA have confirmed that they never considered, much less intended, such a result. *See* Forfeiture Issues: Hearing Before House of Representativs Subcommittee on Crime, Committee on the Judiciary, 99th Cong., 1st Sess. 178 (1985) (statement of Rep. Shaw); Field Hearing on Federal Drug Forfeiture Activity: Hearing Before House of Representatives, Subcommittee on Crime, Committee on the Judiciary, 100th Cong., 2d Sess. 177, 181 (1988) (statements of Rep. Shaw and Chairman Hughes).

[6] An equally fundamental principle instructs that ambiguous criminal statutes must be narrowly construed. *McNally v. United States*, 107 S. Ct. 2875, 97 L.Ed.2d 292, 302 (1987); *Rifulco v. United States*, 447 U.S. 381, 387 (1980). The rule of lenity has been applied to the criminal forfeiture laws. *See, e.g., United States v. McKeithen*, 822 F.2d 310, 315 (2d Cir. 1987).

The troubling constitutional issues raised by fee forfeiture have convinced many, although not all, courts that have construed the CFA to interpret the Act narrowly so as to exempt bona fide attorneys' fees.[7] *See, e.g., United States v. Ianniello*, 644 F. Supp. 452 (S.D.N.Y. 1985); *United States v. Badalamenti*, 614 F. Supp. 194 (S.D.N.Y. 1986); *United States v. Rogers*, 602 F. Supp. 1332 (D. Colo 1985). *See also United States v. Monsanto*, 852 F.2d 1400, 1405 (2d Cir. 1988) (*en banc*) (Winter, J., concurring). *Contra United States v. Nichols*, 841 F.2d 1485, 1493-96 (10th Cir. 1988); *United States v. Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988). The ABA supports the well reasoned conclusions of these courts that the forfeiture laws do not apply to fees paid or payable to defense counsel fulfilling their legitimate and constitutionally prescribed role of providing an effective defense and do not justify pretrial seizures of assets that are reasonably necessary to pay bona fide fees to counsel.

[7] In a concurring opinion in *United States v. Monsanto*, Judge Winter, joined by two other judges, construed the statute narrowly, but without addressing these constitutional difficulties. Judge Winter concluded that the CFA vests discretion with the court to restrain assets identified in an indictment as subject to forfeiture, including counsel fees, and that this discretion is to be guided by traditional equitable principles. In reaching this conclusion, Judge Winter focused on the "permissive" nature of the statutory language which states that a court "may" enter a restraining order. After balancing the relative hardships to the parties, Judge Winter concluded that the government's nominal property rights in potentially forfeitable assets do not outweigh the hardship imposed on a defendant who is prevented from retaining private counsel of choice. For substantially the same reasons, he further concluded that once a district court finds that counsel fees are exempt from pre-trial restraint, those assets are exempt from subsequent post-conviction forfeiture.

II. IF THE CFA PERMITS FEE RESTRAINTS AND FEE FORFEITURE, IT VIOLATES THE ACCUSED'S RIGHT TO COUNSEL.

Fee forfeiture threatens core constitutional issues of profound significance to our adversary system of criminal justice. The potential impact of these constitutional infirmities is far-reaching; Congress has authorized criminal forfeiture as a sanction for an estimated 25% of the criminal cases brought in federal courts, *United States v. Nichols*, 841 F.2d at 1488, and the list of offenses for which forfeiture is a sanction has steadily increased.[9] Accordingly, the ABA urges that, if the Court finds that fee forfeiture is authorized by statute, the Court should hold that fee restraints and fee forfeiture infringe on rights secured by the Sixth Amendment.

A. Fee Forfeiture Violates a Defendant's Sixth Amendment Right to Counsel of Choice.

The Sixth Amendment guarantees that a criminal defendant with the resources to retain counsel has the right to choose his or her own counsel. *Wheat v. United States*, 108 S. Ct. 1692, 100 L.Ed. 2d 140 (1988); *Powell v. Alabama*, 287 U.S. 45, 53 (1932). Courts are reluctant to dishonor the defendant's choice of counsel because "[e]mbodied within the Sixth Amendment is the

[9] In 1984, for example, Congress expanded the class of offenses for which forfeiture is possible to include all drug offenses, obscenity offenses, and violations of the Currency and Foreign Transactions Reporting Act. *See* 18 U.S.C. § 1961(1). In 1986, Congress created broad new money-laundering offenses, codified at 18 U.S.C. §§ 1956, 1957, for which forfeiture is a possible sanction. *See* 18 U.S.C. § 1961(1). In 1988, Congress enacted legislation adding additional offenses, such as credit card fraud, 18 U.S.C. § 1029, and copyright infringement, 18 U.S.C. § 2319, to this expanding list of offenses for which forfeiture is a possible sanction.

conviction that a defendant has the right to decide, within limits, the type of defense he wishes to mount." *United States v. Laura*, 607 F.2d 52, 56 (3d Cir. 1979) (citing *Faretta v. California*, 422 U.S. 806 (1975), and *Brooks v. Tennessee*, 406 U.S. 605 (1972)). *See also Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934). "It is from this principle and belief that the defendants' right to select a particular individual to serve as his attorney is derived. For the most important decision a defendant makes in shaping his defense is his selection of an attorney." *United States v. Laura*, 607 F.2d at 56.

Admittedly, the right to counsel of choice is a qualified right. It is conditioned, initially, on the accused having sufficient assets to hire the lawyer of his choice. For example, when an impecunious defendant desires to have the court appoint a particularly celebrated defense counsel, the court is not obliged to enforce that preference. That, of course, is a far cry from allowing a court, at the instance of the prosecution, to strip the accused of assets so that he cannot retain the otherwise available counsel of his choice.

Moreover, the right to counsel of choice, where sufficient assets to pay the attorney are available, may be overcome in limited circumstances when the orderly administration of justice so requires. As almost every court that has considered the issue has recognized, the government may have other legitimate countervailing interests—such as an interest in acquiring all property allegedly traceable to illegal activity—but those interests must be weighed against the defendant's right to select counsel. *See United States v. Unit No. 7 and Unit No. 8*, 853 F.2d at 1450-51; *United States v. Nichols*, 841 F.2d at 1502. *See also United States v. Monsanto*, 852 F.2d 1400, 1402 (2d Cir. 1988) (en banc) (Feinberg, J. with Oakes & Kearse, JJ. concurring). The majority of the Fourth Circuit *en banc* in *Caplin & Drysdale*, however, never undertook to apply the required Sixth

Amendment balancing test because it incorrectly concluded that a defendant has *no* ownership interest in allegedly forfeitable assets and the qualified right to counsel "does not apply at all in the fee forfeiture context." *United States v. Caplin & Drysdale*, 837 F.2d 637, 644 (4th Cir. 1988) (en banc).

In so holding, the court apparently relied on the "relation back provision" of the CFA, which, upon conviction, vests title to the defendant's forfeitable assets in the government, as of the date the assets were illegally acquired or used. The court thus viewed the government's mere allegations of forfeiture in the indictment, in conjunction with the relation back doctrine, as sufficient to divest the defendant of any property interest in the contested assets. In sum, the court concluded, the defendant against whom an unproved claim of forfeiture has been made "does not have the legal assets that entitle him to a right to counsel of choice in the first place." *Id.*

The ABA submits that this analysis simply fails to take account of the presumption of innocence. By asserting that the relation back doctrine bars a defendant's use of allegedly forfeitable property to pay his attorney, the Fourth Circuit in essence concluded that these assets are indeed forfeitable. This conclusion strikes at the very core of our adversary system under which the defendant is presumed innocent and his assets are thus presumptively legitimate. The relation back doctrine, which is triggered only upon conviction, *United States v. Nichols*, 841 F.2d at 1498; *United States v. Thier*, 801 F.2d 1463, 1476 (5th Cir. 1986), *modified*, 809 F.2d 249 (5th Cir. 1987), does not purport to eliminate the presumption of innocence prior to trial nor does it authorize the imposition of punitive sanctions prior to a conviction. Thus, until the defendant has been convicted, the government must offer some justification sufficiently

compelling to override the defendant's right to utilize his presumptively legal assets in his own defense.[9]

When the proper Sixth Amendment balancing test is applied, a defendant's interest in choosing counsel outweighs the government's interest in forfeiting bona fide attorneys' fees. The only interest of the government lies in preserving the availability of the defendant's assets so that they may be forfeited after a possible guilty verdict at trial. That interest is essentially punitive—to deprive the guilty defendant of the enjoyment of the fruits of his illegal activity. *United States v. Unit No. 7 and Unit No. 8*, 853 F.2d at 1451; *United States v. Lizza Industries*, 775 F.2d 492, 498 (2d Cir. 1985). Although the ABA fully supports the government's legitimate interest in using the forfeiture laws to punish convicted criminals, that interest is not sufficiently compelling to overcome the primacy of a defendant's interest in choosing his counsel prior to trial.

Indeed, the forfeiture of assets otherwise destined for payment of—or actually paid as—bona fide attorneys' fees serves little, if any, punitive value. Assets properly paid to counsel would be inaccessible to the defendant in any event, thus depriving the defendant of their economic

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[9] Contrary to the Fourth Circuit, the Eighth and Tenth Circuits recognize that fee restraints and forfeitures affect a defendant's right to choose counsel, thus requiring a weighing of the government's interests against the defendant's qualified Sixth Amendment right to choose counsel. *United States v. Unit No. 7 and Unit No. 8*, 853 F.2d 1445, 1450-51 (8th Cir. 1988); *United States v. Nichols*, 841 F.2d 1485, 1502 (10th Cir. 1988); *See also United States v. Monsanto*, 852 F.2d 1400, 1402 (2d Cir. 1988) (Feinberg, J. with Oakes & Kearse, JJ. concurring). On the other hand, the Seventh Circuit, which has adopted the Fourth Circuit's conclusion that the relation back doctrine divests a defendant of any interest in allegedly forfeitable assets prior to trial, has nonetheless held that, before trial, a defendant has a sufficient interest in using his property to pay counsel to warrant the Fifth Amendment protections of due process. *See United States v. Moya-Gomez*, 860 F.2d 706, 725-26 (7th Cir. 1988).

value. *United States v. Thier*, 801 F.2d at 1474-75. In contrast, the clear and direct infringement on a defendant's constitutional rights wrought by fee forfeiture would be substantial.

Nor should this Court sanction the Fourth Circuit's suggestion that the general penal goals underlying the forfeiture statute should encompass efforts to strip defendants of their ability to hire private qualified defense counsel. Contrary to the Fourth Circuit's majority opinion, neither the CFA nor its legislative history contains *any* evidence of a Congressional intent to prevent payment of legitimate attorneys' fees either before, during or after trial. Moreover, while weakening the ability of an accused to defend himself at trial by denying him private counsel of choice undoubtedly would provide a significant advantage to the government, the ABA believes such objectives to be both an illegitimate exercise of government power and constitutionally infirm. *See United States v. Monsanto*, 852 F.2d at 1403 (Feinberg, J. with Oakes & Kearse JJ., concurring). The impairment of a defendant's right to select counsel even before a verdict of guilt is obtained would amount to little more than imposition of punishment prior to trial in clear violation of the accused's right to due process of law.

The grave ramifications caused by fee forfeiture will often be sufficient to deprive a defendant of *any* ability to retain counsel of choice prior to an adjudication of guilt or innocence. Even those defendants with sufficient, presumptively legal, assets to retain counsel of choice may well be unable to do so because of the chilling effect of possible restraints or forfeiture on counsel's willingness to undertake representation.[10] *United States v.*

[10] As this Court has recently observed, "It is a rare attorney who will be fortunate enough to learn the entire truth from his client, much less be fully apprised of what each of the government's witnesses will say on the stand." *Wheat v. United States*, 108 S.Ct. 1692, 100 L.Ed.2d 140, 152 (1988). If fee forfeiture is permitted,

Badalamenti, 614 F. Supp. 194, 196 (S.D.N.Y. 1985); *United States v. Estevez*, 645 F. Supp. 869, 871 (E.D. Wis. 1986). The government's nominal interest in preserving assets for possible forfeiture cannot justify this serious erosion of Sixth Amendment rights.

B. The Prior Restraint and Forfeiture of Bona Fide Attorneys' Fees Violates the Defendant's Sixth Amendment Right to Effective Assistance of Counsel.

The use of the forfeiture laws against bona fide attorneys' fees also deprives the defendant of the attorney-client relationship necessary for the effective assistance of counsel guaranteed by the Sixth Amendment.

If attorneys' fees are subject to forfeiture after trial, defense counsel's collection of earned fees is contingent on the outcome of the trial—a situation that raises serious ethical concerns. The ABA Model Rules of Professional Conduct declare: "A lawyer shall not enter into an arrangement for, charge, or collect . . . a contingent fee for representing a defendant in a criminal case." Model Rules of Professional Conduct Rule 1.5(d)(2). *See also* Model Code of Professional Responsibility DR 2-106(C).

In addition, the Rules prohibit representation of a client in a matter affecting the attorney's personal financial interests. Rule 1.7(b) of Model Rules of Professional Conduct; *see also* Model Code of Professional Responsibility DR 5-101(A). Defense counsel faces an intolerable conflict of interest created by his pecuniary interest in the outcome of the litigation. If counsel fees are indeed forfeited at trial, the sole statutory mechanism for relief lies in a post-trial hearing at which defense counsel bears

both of these rare events will have to occur before defense counsel could have any degree of confidence that his fees would be safe from possible forfeiture.

the burden of proving his ignorance of the facts which support the forfeiture verdict. *See* 21 U.S.C. § 853(n)(6); 18 U.S.C. § 1963(m)(6). Whereas, before and during trial, counsel must investigate and master all relevant evidence to defend his client, after trial, counsel must prove his ignorance of both the facts leading to fee forfeiture and the government's forfeiture contentions.[11] Thus, "the attorney's obligation to thoroughly investigate his client's case would conflict with his interest in not learning facts tending to inform him that his fee will be paid with the proceeds of illegal activity." *United States v. Reckmeyer*, 631 F. Supp. 1191, 1197 (E.D. Va. 1986), *aff'd*, 814 F.2d 905 (4th Cir. 1987), *rev'd sub nom. United States v. Caplin & Drysdale*, 837 F.2d 637 (4th Cir. 1988) (en banc).

Defense counsel faces other conflicts of loyalty as well that pose serious dilemmas under the ethical rules that guide the legal profession. For example, defense counsel will have a conflict in advising his client about a possible plea bargain that touches upon the forfeitability of the defendant's assets. Conflicts affecting such negotiations have been noted by a number of courts. *See United States v. Bassett*, 632 F. Supp. 1308, 1316 n.5 (D. Md. 1986), *aff'd*, 814 F.2d 905 (4th Cir. 1987), *rev'd sub nom. United States v. Caplin & Drysdale*, 837 F.2d 637 (4th Cir. 1988) (en banc); *United States v. Reckmeyer*, 631 F. Supp. at 1197; *United States v. Ianniello*, 644 F. Supp. 452 (S.D.N.Y. 1985).

Finally, a statutory scheme that makes a litigable issue out of the state of defense counsel's knowledge risks a profound intrusion on attorney-client communications. Trial and grand jury subpoenas may be issued to defense counsel to testify regarding the amount and

[11] Counsel thus also has a financial interest in not placing his factual and legal knowledge about the potential forfeitability of the defendant's assets on the record during the course of the criminal proceedings.

method of fee payments so as to demonstrate the forfeitability of the payments.[12] These place defense counsel in the untenable position of being a witness against his own client.[13] Such inquiries before, during, and after trial, which necessarily focus on counsel's knowledge of the defendant's financial activities, will chill attorney-client communications.

These multiple conflicts of interest are not answered, as the Fourth Circuit suggested below, by assuming that counsel, acting within the bounds of the canons of ethics, will be able to overcome them. Even the most conscientious defense attorney, faced with the prospect of an actual personal conflict with his client, may find it difficult to provide the undivided loyalty and independent judgment that professional ethics require and that the Constitution presupposes in protecting the accused's right to the *effective* assistance of counsel. *See, generally Strickland v. Washington*, 466 U.S. 668 (1984).

Moreover, wholly apart from the corrosive influence a conflict of interest has on counsel's ability to provide independent judgment to his client, judicial tolerance of such conflicts will undermine public confidence in the integrity of our criminal justice system. As this Court recently observed, "Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat v. United States*, 108 S.Ct. 1692, 100 L.Ed.2d 140, 149 (1988).

[12] In February, 1986, the ABA House of Delegates adopted a resolution endorsing a requirement for prior judicial review of subpoenas directed at defense counsel by the prosecution. The supporting ABA Report carefully analyzes the chilling effect of subpoenas on the attorney-client relationship.

[13] The ABA Model Rules generally forbids representation in any case in which counsel may be called as a witness, *see* Model Rule 3.7; Model Code DR 5-102.

Nor is it an answer, as the Fourth Circuit suggested below, that ineffective assistance of counsel claims based on conflicts of interest are "properly reviewed only on the individual facts of a particular case." *United States v. Caplin & Drysdale*, 837 F.2d at 647. As this Court has held, when a defense attorney labors under an actual conflict of interest, "prejudice in these circumstances is so likely that case by case inquiry into prejudice is not worth the cost." *Strickland v. Washington*, 466 U.S. at 692; *United States v. Chronic*, 466 U.S. 648, 662 n.31 (1984).

The use of a pre-trial mini-hearing, as suggested by the panel opinion in *Monsanto*, will not eliminate these problems, but will simply advance the moment at which they become apparent. Initially, the defendant must face the question of who will represent him at the pre-trial mini-hearing. Retained counsel may be unwilling to prepare for a hearing addressing both the guilt of the defendant and the forfeitability of the defendant's assets when the fee for such work is uncertain.

In any event, assuming that the defendant retains counsel to handle the mini-hearing, almost every aspect of preparation will create difficult ethical questions. Because of the importance of the mini-hearing to both counsel's continued role and the defendant's choice of representation, the pressures will be strong to accelerate discovery and prepare in depth for the mini-hearing. Such preparation, in turn, will increase the stakes. Consequently, the term "mini-hearing" may well be a misnomer as defense counsel may have a personal interest in protracting the proceedings to challenge the government's contentions.

Should the government prevail at the mini-hearing, however, retained counsel, as a practical matter, may be required to withdraw because full payment of his fee would be contingent on the outcome of the trial. In addition, if trial results in an adverse verdict on the forfeiture allegations, the only means for counsel to recover

for effort previously invested in the case would be to demonstrate, at a post-trial forfeiture hearing, a lack of knowledge that any payments made to counsel stemmed from forfeitable assets. *See* 18 U.S.C. § 1963(*l*); 21 U.S.C. § 853(n)(6). Thus, even prior to the mini-hearing, retained counsel must deal with the dilemma that any knowledge he acquires to prepare for the mini-hearing may later be used against him to preclude post-trial relief.

The appointment by the court of different counsel to handle the mini-hearing or other aspects of pre-trial preparation would have other disadvantages. First, current law does not generally permit appointment of counsel before initiation of formal adversary judicial proceedings. *See United States v. Hershon*, 625 F. Supp. 735 (D. Mass. 1986) (no constitutional right to appointment of counsel for grand jury witness). In contrast, private counsel are frequently retained months or even years earlier. By the time a public defender or other counsel has been appointed, the defense attorney will have confronted all of the conflicts discussed above and the defendant's legitimate interests may already have been compromised.

Moreover, the forced substitution of appointed counsel late in the criminal proceeding places appointed counsel at a distinct disadvantage. Our system of appointed representation is designed to serve the truly indigent and can ill afford the burdens associated with systematic substitution of appointed counsel into both complex and even routine criminal cases. *See* Concerning Forfeiture of Attorneys' Fees: Hearings before the Senate Committee on the Judiciary, 99th Cong., 2d Sess. (1986) (statement of Federal Public Defender Edward Marek, on behalf of Federal Public Defenders and Federal Community Defenders). The immediate consequences of this added burden will fall on truly indigent defendants, who will now compete with non-indigent defendants for the

dwindling and overtaxed resources of appointed federal defenders.

Finally, the timing of an application for a pretrial restraining order, and the invocation of the relation back doctrine are left, in the first instance, to the unfettered discretion of the prosecution. *See* 21 U.S.C. §§ 853(c), (e); 18 U.S.C. §§ 1963(c), (e). As a practical result, such a restraining order will likely cause counsel to withdraw, because many lawyers may not wish to handle such cases without compensation. This would vest the prosecution with the discretionary authority to disengage the services of chosen defense counsel at any stage in the criminal proceeding. The prospect of the government exercising a veto power over the attorney-client relationship casts a cloud over the effective representation provided by counsel. This Court has already determined that: "Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." *Strickland v. Washington*, 466 U.S. at 687; *Walberg v. Israel*, 766 F.2d 1071, 1076 (7th Cir.), *cert. denied*, 474 U.S. 1013 (1985).

For these reasons, neither the requirement of a mini-trial nor the appointment of counsel will eliminate the substantial concerns about the effectiveness of the legal assistance provided to the defendant where fee payments are subject to forfeiture.

III. IF THE CFA PERMITS FEE RESTRAINTS AND FEE FORFEITURE, IT VIOLATES THE ACCUSED'S RIGHT TO DUE PROCESS.

Fee forfeiture also violates due process because it gives the government an ability to control the resources of the defense. The Due Process Clause "does speak to the balance of forces between the accused and his accuser." *Wardius v. Oregon*, 412 U.S. 470, 475 (1973). "There can be no fair trial unless the accused receives the services of an effective and independent advocate." *Polk County v. Dodson*, 454 U.S. 312, 322 (1981).

Prior restraints and subsequent forfeiture of bona fide fees enable government counsel to determine who will be his adversary, to restrict the resources available to present a defense, and even to determine the time when chosen counsel will withdraw. The independence of defense counsel is compromised by the prospect of continued representation only by the grace of the prosecution. Fundamental fairness, which is guaranteed by the Fifth Amendment, *see Estelle v. Williams*, 425 U.S. 501, 505 (1976); *Powell v. Alabama*, 287 U.S. 45, 63 (1932), demands that the defendant not be handicapped in this way in the presentation of his defense. A system that affords one party to a controversy the discretion to restrict the resources available to its opponent to contest the very allegations at issue is no longer an adversarial system within the rubric of our American tradition.

The confidence that our society must place in the judgments entered in our criminal justice system requires nothing less than a test of the evidence by true adversaries. Our system of criminal justice is predicated on the assumption that the vigorous assertion of a defendant's rights "will best promote the ultimate objective that the guilty be convicted and the innocent go free." *United States v. Chronic*, 466 U.S. at 655 (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975)). Our adversary system demands that the government prevail by proving its allegations, not by crippling an accused's ability to mount a defense.

CONCLUSION

For the foregoing reasons, the ABA submits that the prior restraint and forfeiture of bona fide attorneys' fees paid for services legitimately rendered in defending a criminal charge are not encompassed by the forfeiture statutes and are not tolerated by the United States Constitution.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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IN THE

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Petitioner,

—v.—

PETER MONSANTO,

Respondent.

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INTERESTS OF AMICI

The four organizations identified below, with the consent of both parties, respectfully submit this brief, as *amici curiae* in support of respondent. *Amici* are membership organizations of attorneys in New York State who have an interest in preserving and strengthening our adversarial system of justice.

The Association of the Bar of the City of New York (a membership organization of about 18,000 attorneys formed in 1870)

has achieved national recognition for its expertise and its commitment to improving the criminal justice system.

The New York Council of Defense Lawyers—composed of about 55 members of the criminal defense bar in the metropolitan area of New York City—promotes institutional reform of the criminal justice system.

The New York Criminal Bar Association is an organization of about 250 criminal defense attorneys who practice primarily in Manhattan.

The New York State Association of Criminal Defense Lawyers is a state-wide organization of approximately 350 attorneys who specialize in the practice of criminal law.

Amici have an interest in sustaining a strong adversarial system of justice. *Amici* fear that our longstanding adversary system will be undermined unless the decision of the Court of Appeals is affirmed.

SUMMARY OF ARGUMENT

A majority of the active judges of the Second Circuit sitting en banc concluded that the provisions of the Comprehensive Forfeiture Act of 1984, Pub. L. 98-473, 98 Stat. 2044, as codified in 21 U.S.C. § 853 (1984) (the "statute"), did not apply, or could not constitutionally be applied, to attorneys' fees. While their reasons differed, the common denominator was a recognition that when criminal forfeiture precludes retention of counsel of choice, it threatens one of a free country's most precious values: the right of an accused to counsel of his or her own choice. *Amici* believe that the Second Circuit was correct in refusing to apply the forfeiture statute to attorneys' fees.

The application of the criminal forfeiture statute to attorneys' fees violates the rights of criminal defendants under the Sixth Amendment. If the statute applies to attorneys' fees, it impermissibly impinges on a defendant's right to counsel of choice. Moreover, application of criminal forfeiture to attorneys' fees either before or after trial will undermine the

adversarial process which is the cornerstone of our system of justice. By giving the prosecution an ultimate tactical weapon—the power to scare off the most capable adversaries—the specter of post-trial fee forfeiture impermissibly tilts the equilibrium between the parties in favor of the prosecution. The threat of fee forfeiture will impair the attorney-client relationship, by creating an inherent conflict of interest for attorneys and by undermining the privileged communications that are the basis of effective representation. The damage done to the entire criminal justice system by forfeiture of attorneys' fees would hamper effective representation by counsel of choice for a growing class of defendants.

If the statute reaches attorneys' fees, it also violates the due process clause of the Fifth Amendment. Congress clearly intended to deny post-indictment hearings on restraining orders issued to preserve assets for forfeiture. When applied to attorneys' fees, the statute permanently deprives defendants of their right under the Sixth Amendment to choose their own counsel, and does so on the basis of an ex parte proceeding. Therefore this Court should hold that the statute violates due process because it fails to provide the hearing that is constitutionally required. Judicial efforts to accord due process by providing post-indictment hearings not authorized under the statute, and not intended by Congress, violate the separation of powers mandated by the Constitution. Congress made a conscious policy choice not to provide post-indictment hearings. If the statute is to be rewritten to provide for such hearings, it is for Congress, not the courts, to do.

If, however, this Court should determine that the statute may constitutionally be applied to attorneys' fees by reading a post-indictment hearing into the statute, it should provide a hearing that is constitutionally adequate The hearing provided by the original panel decision below was not. Moreover, if the right to retain defense counsel with assets the government claims may be subject to forfeiture is to be meaningful, attorneys' fees must be exempt from recapture after trial.

For these reasons, the judgment of the Second Circuit Court of Appeals en banc holding that legitimate (non-sham) attorneys' fees should be exempt from post-indictment forfeiture both before and after trial should be affirmed.

ARGUMENT

I. IF THIS COURT FINDS THAT CONGRESS INTENDED THE STATUTE TO ENCOMPASS LEGITIMATE ATTORNEYS' FEES, IT SHOULD FIND THAT THE STATUTE VIOLATES THE SIXTH AMENDMENT.

A. If This Court Can Construe the Statute To Avoid Reaching Constitutional Questions, It Should Do So.

The Comprehensive Forfeiture Act, which revised the forfeiture provisions of both the RICO, Pub. L. 98-473, 98 Stat. 2040, 18 U.S.C. 1963, and narcotics trafficking ("CCE"), 21 U.S.C. § 853, statutes, provides that all right, title, and interest in property later proven to be subject to forfeiture vests in the government as of the date the underlying offense was committed. Under this "relation back" theory, any property transferred to a third party after the date of the crime (and after the theoretical vesting of title in the government) is also subject to forfeiture unless the recipient can establish at a hearing that he or she is a "bona fide purchaser for value . . . who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture." 21 U.S.C. § 853(c).

The statute articulates only one explicit exemption—for bona fide purchasers—and that exemption presumably would not apply to attorneys. The government contends that no competent attorney would qualify as a purchaser who lacked notice of the potential for forfeiture because the indictment would surely place counsel on notice. The Justice Department maintains that attorneys "who among all third parties uniquely may be aware of the possibility of forfeiture," should be disqualified as bona fide purchasers. Justice Department Guidelines on Forfeiture of Attorneys' Fees, 38 Crim. L. Reptr. 3001, 3003 (1985). The

Justice Department further warns that even generalized allegations that all of a defendant's assets might be subject to forfeiture should be sufficient warning that an "attorney who accepts any such assets acts at his peril." *Id.* at 3006.

Unless this Court rejects the government's view that the statute reaches attorneys' fees, it will have to consider whether the statute, as so applied, violates the Fifth and Sixth Amendments. If a statute is susceptible to two or more interpretations, courts should interpret the statute to avoid constitutional questions. *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). Two alternative constructions of the statute, based on the legislative history and the common law, offer interpretations that would enable this Court to avoid reaching constitutional questions that arise under the Fifth and Sixth Amendments.

The legislative history reveals that Congress did not expressly intend to reach legitimate attorneys' fees. Indeed, it barely considered the problem. The only direct mention of attorneys' fees in the legislative history is a statement by the House Committee that "[n]othing in the section is intended to interfere with a person's Sixth Amendment right to counsel." But the Committee apparently anticipated that the treatment of attorneys' fees under the statute might be subjected to judicial scrutiny for it observed that it "therefore does not resolve the conflict in District Court opinions on the use of restraining orders that impinge on a person's right to retain counsel in a criminal case." H.R. Rep. No. 845, 98th Cong., 2d Sess. Pt. 1 at 19, n.1 (1984).

If this Court concludes that application of the statute to attorneys' fees implicates the Sixth Amendment, as we believe it must, then it should interpret the statute as not applying to attorneys' fees. *DeBartolo Corp.* v. *Florida Gulf Coast Bldg. and Const. Trades Council*, ____ U.S. ____, 108 S. Ct. 1392, 1397 (1988) (in the absence of affirmative legislative intent, courts will "not lightly assume that Congress intended to infringe" constitutional rights); *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (finding an additional statutory exception for parochial school teachers to avoid implicating the

religion clauses). Several district courts have construed exceptions for attorneys' fees.[1]

Judge Winter, concurring in the en banc judgment below, offers another approach that saves the statute. He finds that the statute does not divest the courts of their traditional equitable powers. Petitioner's Appendix at 10a-26a.[2] Judge Winter then holds that it would be an abuse of judicial discretion for a court not to permanently exempt from forfeiture any funds required by a defendant for essential legitimate expenditures, including attorneys' fees.

If this Court were to adopt Judge Winter's reasoning, it could protect the interests of Monsanto and others similarly situated, by ruling that the statute cannot be applied to attorneys' fees. But if this Court finds that Congress intended the statute to encompass legitimate attorneys' fees, then the Court must consider whether the statute as so applied withstands constitutional scrutiny. We believe that the Sixth Amendment bars forfeiture of funds needed to pay legitimate attorneys' fees, and this Court should so hold.

B. When the Statute Is Applied To Attorneys' Fees, It Violates the Sixth Amendment By Impermissibly Impinging On a Defendant's Right To Counsel of Choice and By Undermining the Adversary System.

1. If the statute reaches attorneys' fees, it impinges impermissibly on the Sixth Amendment right to counsel of choice.

When the statute is applied to attorneys' fees, it violates the Sixth Amendment by preventing accused persons from retaining the counsel of their choice to defend them against criminal

1 *United States* v. *Rogers*, 602 F. Supp. 1332 (D. Co. 1985); *United States* v. *Badalamenti*, 614 F. Supp. 194 (S.D.N.Y. 1985); *United States* v. *Ianniello*, 644 F. Supp. 452 (S.D.N.Y. 1985).

2 Because the parties did not submit a Joint Appendix, citations to opinions below refer to the Appendix to Petitioner's Brief in support of its motion for certiorari, referred to hereafter as "Pet. App."

charges. The right to counsel of choice is a critical aspect of the more general right to counsel, because the Sixth Amendment contemplates that "a defendant has the right to decide, within limits, the type of defense he wishes to mount . . . . [T]he most important decision a defendant makes in shaping his defense is his selection of an attorney." *United States* v. *Laura*, 607 F.2d 52, 56 (3d Cir. 1979).

Any qualifications on the right to counsel of choice have thus far only prevented a defendant from retaining a particular individual as his attorney, and are inapposite here. *E.g.*, *Wheat* v. *United States*, ____ U.S. ____, 108 S. Ct. 1692 (1988) (concern for the appearance of judicial propriety empowers a court to deny a defendant the right to choose an attorney who has a conflict of interest); *Sampley* v. *Attorney General of North Carolina*, 786 F.2d 610 (4th Cir.), *cert. denied*, 478 U.S. 1008 (1986) (no adjournment required when attorney not yet released from public employment). In each instance, a non-indigent defendant retains the right to select, as a second choice, any other member of the bar who is willing to represent him, assuming that no similar impediment emerges. But in this case the restraining order prevented a non-indigent defendant from selecting and retaining *any* member of the private bar.

The right to choose a private attorney is, of course, constrained by a defendant's financial resources. Defendants without sufficient resources must rely on attorneys paid—and often appointed—by the government. *United States* v. *Ely*, 719 F.2d 902 (7th Cir. 1983), *cert. denied*, 465 U.S. 1037 (1984). But here, the accused possessed resources adequate to hire private counsel, resources that the government had not yet shown to be traceable to illegitimate activities. The restraining order prevented the accused from retaining the attorney of his choice with funds not yet shown to be forfeitable. Pet. App. at 53a. The statute, as applied, therefore violates a defendant's Sixth Amendment right to counsel of choice.

2. If the statute reaches attorneys' fees, it impermissibly undermines the adversary process.

Fee forfeiture also implicates the constitutional commitment to fundamental fairness within the entire adversary system. The power the government seeks here and in *Caplin & Drysdale* (which is being heard in tandem with the instant case) would impermissibly tilt the balance of forces in the adversary process, a balance on which the very legitimacy of the criminal justice system rests.

If the government prevails here and in the companion case, it will be able to choose when it wishes to discourage the most capable or the most aggressive members of the private bar from representing defendants by invoking the threat of post-trial forfeiture. Where private counsel remain in cases despite such threats, the effectiveness of the advocacy they are able to provide may be seriously compromised.

Whether it arises in the form of pre-trial restraint or post-trial recapture, the threat that the government may seize assets needed to pay defense attorneys strikes at the very heart of the adversary system of justice. Vigorous representation by defense counsel serves the interests of justice by promoting discovery of the truth. Our system is "premised on the well-tested principle that truth—as well as fairness—is 'best discovered by powerful statements on both sides of the question.' " *Penson* v. *Ohio*, 57 U.S.L.W. 4020, 4022 (1988) *quoting* Kaufman, Does the Judge Have a Right to Qualified Counsel?, 61 A.B.A.J. 569, 569 [sic] (1979) (*quoting* Lord Eldon). *See also Herring* v. *New York*, 422 U.S. 853, 862 (1975) (partisan advocacy promotes the ultimate objective of discovering the truth).

The frustration of Congressmen, law enforcement officials, and even members of the judiciary, in dealing with the seemingly intractable problems of drug trafficking and organized crime is understandable. But the Second Circuit wisely resisted the temptation to let such frustrations interfere with its constitutional analysis. The right to private counsel cannot turn on how unsavory the particular crime or criminal may be. *In Re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F.2d 637, 650 (Phillips, J., dissenting) (4th Cir.), *cert. granted*, ____ U.S. ____, 57 U.S.L.W. 3333, No. 87-1729 (1988). Further, "the right to counsel belongs to guilty defendants as well as innocent ones." *United States* v. *Badalamenti*, 614 F. Supp. 194, 198 (S.D.N.Y. 1985).

The criminal forfeiture statute now applies to an estimated twenty-five percent of the criminal cases prosecuted in federal courts. *United States* v. *Nichols*, 841 F.2d 1485, 1488 (10th Cir. 1988), *citing* Hughes & O'Connell, In Personam (Criminal) Forfeiture and Federal Drug Felonies, 11 Pepperdine L. Rev. 613, 626 (1984). If the government prevails here, the threat of criminal forfeiture could become routine in all but the simplest cases, leading to increased reliance on court-appointed counsel and the virtual socialization of criminal defense work in this country. Ironically, at a time when the Soviet Union proposes to create an independent bar, the government's position here would move this country in the opposite direction.

Like most other people, lawyers will not work unless they are paid to do so. It is no minor commitment to undertake defense of a RICO or CCE prosecution. Trials may last six months, a year, or more. Few defense lawyers—even the most established—could maintain their practice while pursuing cases of such complexity and duration.[3] Attorneys cannot afford to accept such demanding cases when ultimate payment is in jeopardy.

Even if attorneys were willing to take on matters where attorneys' fees were subject to forfeiture, attorneys' fees in cases where forfeiture is threatened would be contingent on success at trial. Therefore, representation in the face of forfeiture may violate professional ethics. A.B.A. Model Code of Professional Responsibility, DR2-106(C). *United States* v. *Ianniello*, 644 F. Supp. 452, 457 (S.D.N.Y. 1985); *United States* v. *Badalamenti*, 614 F. Supp. 194, 196 (S.D.N.Y. 1985).

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3 Consequently, it is also unlikely that many attorneys will volunteer for, let alone be willing to accept, assignments as court-appointed counsel in these cases.

If, despite all the obstacles, a private attorney represented a defendant whose assets were liable to forfeiture, the nature of the relationship would potentially be so compromised that the right to effective assistance of counsel would be jeopardized. An inherent conflict of interest would arise between the attorney's desire to collect a fee and the best interests of the accused. Thus, for example, an attorney might advise a client to plead guilty in order to avoid forfeiture, or, alternately, might advise a client not to plead guilty where the government is intractable in its decision to seek forfeiture. *United States* v. *Ianniello*, *supra*, 644 F. Supp. at 457; *United States* v. *Badalamenti*, *supra*, 614 F. Supp. at 196-97. Although it is assumed that few attorneys would act explicitly in their own self-interest, neither attorneys nor their clients could ever be sure what mix of motives informed an attorney's advice in the context of potential fee forfeiture.

Moreover, counsel who harbor any hope of qualifying for the bona fide purchaser exemption will have an incentive not to learn the source of a client's assets. This consideration would diminish the free flow of confidences between clients and attorneys which is essential to adequate representation. Even if legal work completed prior to, or unrelated to, indictment were exempt from forfeiture, defendants would be at an enormous disadvantage if—upon indictment—they could no longer retain long-standing counsel.

Nor will such constraints on the attorney-client relationship be limited to the post-indictment stage. Under the facts of cases like *Caplin & Drysdale*, even an attorney rendering tax or business advice would need to wonder whether each client who entered his office might be engaged in some activity that could later be construed to be a RICO violation. Attorneys would need to scrutinize all sorts of prospective clients, including lawyers, dentists, and stockbrokers. *See, e.g.*, *United States* v. *Ginsberg*, 773 F.2d 798 (7th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986) (attorney); *United States* v. *Kravitz*, 738 F.2d 102 (3d Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985) (dentist); *United States* v. *Regan*, 858 F.2d 115 (2d Cir. 1988) (stockbrokers).

Finally, if an attorney seeks to qualify after trial as a bona fide purchaser who lacked notice, he would necessarily rely on evidence gleaned from confidential client communications. The statute thereby chills attorney-client communications and impermissibly impinges on the attorney-client privilege, which is grounded in the Sixth Amendment. *United States* v. *Rogers*, 602 F. Supp. 1332, 1348-49 (D. Co. 1985).

Lest all of these problems seem like a theoretical parade of horribles, it should be noted that recent empirical data confirm what the members of *amici* organizations have reported more informally. Many attorneys in private criminal practice believe that the government will use fee forfeiture and other means at its disposal to discourage zealous criminal defense representation; a significant number have refused to take on a specific case because they feared that the government would seek forfeiture of their fees. Genego, The New Adversary, 45 Brooklyn L. Rev. 1, 33-34 (1988). These reactions by members of the defense bar suggest that the forfeiture of attorneys' fees will have a deleterious impact on the adversary system regardless of whether or not prosecutors abuse the discretion vested in them.

The statute, as applied to attorneys' fees, is unconstitutional on its face because it violates the Sixth Amendment rights of individual defendants and undermines the adversary system upon which the Sixth Amendment is predicated.

II. THE STATUTE IS UNCONSTITUTIONAL AS APPLIED TO ATTORNEYS' FEES BECAUSE IT FAILS TO PROVIDE A POST-INDICTMENT HEARING AS REQUIRED UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

Because Congress authorized ex parte post-indictment restraining orders, the statute violates the due process clause of the Fifth Amendment if it reaches attorneys' fees. The plain language of the statute and the legislative history indicate that Congress intended to deny defendants any hearing with respect to the government's post-indictment application for a restraining order to preserve assets for forfeiture pending completion

of the trial. If this Court so finds, it should go on to hold that *this* statute as written impermissibly strips defendants of property and liberty interests without according them the procedural protection to which they are entitled. The panel below, subsequently reversed by the en banc Court of Appeals, sought to fashion a post-indictment hearing that is not authorized by the statute; but even if it satisfied all of the requirements of due process—which the hearing proposed by the panel did not—a judicially crafted post-indictment hearing would impermissibly encroach upon the powers entrusted to Congress under Article I, § 1 of the Constitution. Pet. App. at 25a (Miner, J., concurring in part, dissenting in part). It is not in the Court's power to cure the constitutional defect here.

A. Congress Intended To Deny Hearings On Post-Indictment Restraining Orders Under 21 U.S.C. § 853

It is axiomatic that "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The language of 21 U.S.C. § 853(e) is unambiguous, and nothing in the legislative history contradicts the clear meaning of the statutory language.

The language of 21 U.S.C. § 853(e)(1)(A) ("Section A"), which deals with post-indictment orders, starkly contrasts with the language of § 853(e)(1)(B) ("Section B") which provides for orders issued prior to indictment. Before indictment, the court "may enter a restraining order or injunction . . . if, after notice . . . and opportunity for a hearing" the court finds a "substantial probability" that the government will prevail on the forfeiture issue, and that the government's interest outweighs the hardship on the defendant. 21 U.S.C. § 853(e)(1)(B). But when the government seeks a restraining order following an indictment, the statute does not refer to notice, a hearing, or a standard of proof. After indictment the court may restrain property simply "upon the filing of an indictment" which

alleges that the property may be subject to criminal forfeiture. 21 U.S.C. § 853(e)(1)(A).

Three principles of statutory construction should inform the Court's reading of this statute. First, Congress does not use superfluous language. *Market Co.* v. *Hoffman*, 101 U.S. 112, 115-16 (1879). If Congress intended to provide a post-indictment hearing in Section A, the language in Section B providing a pre-indictment hearing would be superfluous.

Second, the presence of a phrase in one section of a statute suggests that its absence elsewhere is meaningful:

> [W]here Congress includes a particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

INS v. *Cardoza-Fonseca*, 480 U.S. 421, 432 (1987), *citing Russello* v. *United States*, 464 U.S. 16, 23 (1983). Similarly, the Second Circuit has held that where Congress provided for in camera hearings in one section of a statute, but failed to provide for such hearings in an adjoining section of the same statute, the court will not infer that the silent section also offers an in camera hearing. *United States* v. *Harris*, 707 F.2d 653, 663 (2d Cir. 1983) *cert. denied*, 464 U.S. 997 (1983).

Third, absent evidence to the contrary, this Court should assume that Congress knew what it was doing, and intended to enact precisely the law it enacted. *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980), *reh. denied*, 450 U.S. 960 (1981). In enacting a criminal forfeiture statute that did not provide a post-indictment hearing, Congress intended to accomplish the result made plain by its language. "Congressional silence, no matter how 'clanging' cannot override the words of the statute." *Sedima, S.P.R.L.* v. *Imrex Co., Inc.*, 473 U.S. 479, 495-96 n.13 (1985).

Where the statutory language is unambiguous, as it is here, the Court turns to the legislative history, if at all, merely to ascertain whether that history offers a clearly expressed legisla-

tive intention contrary to the plain language. *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987).

In this instance, the Senate Report clearly stated that "the post-indictment restraining order provision does not require prior notice and opportunity for a hearing." S. Rep. No. 98-225, 98th Cong., 2d Sess., 203, *reprinted in* 1984 U.S. Code Cong. & Adm. News 3182. One motivation for enacting 21 U.S.C. § 853 was that several courts had read a hearing requirement into predecessor statutes on constitutional grounds. *See, e.g.*, *United States* v. *Spilotro*, 680 F.2d 612, 617 (9th Cir. 1982) (RICO); *United States* v. *Long*, 654 F.2d 911, 915 (3d Cir. 1981) (CCE). According to the Senate Report on the 1984 amendments to the federal forfeiture law, Congress intended to override those decisions, which the Senate concluded afforded a defendant the opportunity for pre-trial discovery and made it too difficult to obtain restraining orders. S. Rep. No. 98-225, *supra*, 195-96.

To be sure, the statute allows a district court to hold a hearing to modify or vacate a post-indictment restraining order, but only where that order was "clearly improper (e.g. where information presented at the hearing shows that the property restrained was not among the property named in the indictment)." The legislative history suggests that Congress deliberately omitted meaningful post-indictment hearings, because the Senate Report emphasizes that post-indictment hearings shall not inquire into the validity of allegations contained in the indictment. *Id.* at 203. Congress thus barred inquiry into the merits at any discretionary hearing held after a restraining order was issued.

The plain meaning of the statute is confirmed by the legislative history. Congress intended to deny a meaningful post-indictment hearing on restraint. Pet. App. at 24a (Miner, J., concurring in part, dissenting in part); *United States* v. *Moya-Gomez*, 860 F.2d 706, 723 (7th Cir. 1988).

B. A Post-Indictment Hearing Is Mandated By the Fifth Amendment.

The Fifth Amendment provides, among other things, that no person shall be "deprived of life, liberty or property, without due process of law." Restraint of assets is manifestly an alienation of property. Under criminal forfeiture provisions, that restraint rests entirely on a legal fiction: the relation back doctrine. That doctrine holds that after conviction and after a further finding that the assets in question are traceable to illicit activity, the defendant's property shall be deemed to have belonged to the government as of the day the defendant acquired it. 21 U.S.C. § 853(c). Thus, at the time the restraining order is issued, the government has not yet established that the property in question does not belong to the defendant. Prevention of lawful expenditures of *any* kind therefore constitutes a deprivation of property, which can only withstand scrutiny if accomplished within the confines of due process.[4] *See* Pet. App. at 17a-18a (Winter, J., concurring) (preventing ordinary lawful expenditures would constitute punishment *before* conviction and forfeiture).

When the assets seized are the only assets available to a defendant to pay legitimate attorneys' fees, the deprivation impinges on liberty interests as well. Therefore, the Court must consider whether the process provided by the criminal forfeiture act is constitutionally sufficient to protect a defendant's due process rights in the face of the loss of his Sixth Amendment right to be represented by an attorney of his own choosing.

Due process requires the right to be heard at a meaningful time and in a meaningful manner. *Fuentes* v. *Shevin*, 407 U.S. 67, 80 (1972); *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965).

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4 If this Court were to conclude that Congress did intend to exempt attorneys' fees from forfeiture, post-indictment ex parte restraint would still pose due process problems under the Fifth Amendment. On the facts of this case, however, it is unnecessary to consider what process would be due to a defendant if that restraint only reached property and did not implicate the Sixth Amendment right to counsel of choice.

To be meaningful, the opportunity to be heard must come before the deprivation becomes immutable. When a restraining order is applied to funds needed to pay legitimate attorneys' fees, the accused is permanently deprived of his ability to retain private counsel of his own choosing. The post-trial inquiry into the forfeitability of the restrained assets offers too little, too late. Pet. App. at 24a (Miner, J., concurring in part, dissenting in part); *United States* v. *Moya-Gomez*, 860 F.2d 706, 729 (7th Cir. 1988).

This deprivation holds both constitutional and practical significance. If the defendant is convicted, but establishes at a post-trial forfeiture hearing that the assets seized are not subject to forfeiture because they are traceable to legitimate activities, the defendant has suffered permanent deprivation of the constitutional right to select an attorney. That privately retained attorney might have obtained a favorable verdict, or a conviction on a lesser charge, or a lighter sentence.

In determining what process is due before an accused may suffer restraint of assets needed to pay attorneys' fees, the Court must consider three factors: (1) the private interest affected; (2) the risk of an erroneous deprivation and the probable value of additional safeguards; and (3) the government's interest. *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).

The private interest affected—the preservation of liberty through the exercise of the Sixth Amendment right to counsel—is "among the most fundamental of rights," as this Court has reaffirmed this Term. *Penson* v. *Ohio*, 57 U.S.L.W. 4020, 4022 (1988). *See Powell* v. *Alabama*, 287 U.S. 45, 53 (1932); *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963); *United States* v. *Unit No. 7 and Unit No. 8 of Shop in the Grove Condominium*, (*Kiser*), 853 F.2d 1445, 1450 (8th Cir. 1988) (the right is "among the highest in our constitutional hierarchy"). The Court has explained that the predominance of the right to counsel stems from the fact that " '[o]f all the rights an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.' " *Penson* v. *Ohio*, *supra*, 57 U.S.L.W. at 4022, *citing* Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 8 (1956). The right to choose his own counsel thus affects a defendant's ability to assert all of the rights guaranteed to him.

When a defendant possesses assets sufficient to retain counsel of his choice, and those assets are restrained prior to conviction, leaving him with no other assets that can be used to pay an attorney, the availability of court-appointed counsel or the right to pay private counsel at the rates paid to court-appointed counsel offers small comfort and fails to satisfy the right to counsel of choice.[5] Such a severe deprivation calls for the highest level of scrutiny and procedural protection.

The risk of erroneous deprivation is unacceptably high when a restraining order is issued on the basis of an indictment. An indictment consists purely of unproven allegations. In the Second Circuit, the grand jury is not even required to pass on the government's allegation that assets may be subject to forfeiture. *United States* v. *Grammatikos*, 633 F.2d 1013, 1024-25 (2d Cir. 1980). The government has not even established ex parte a probability that the assets are subject to forfeiture, much less the "substantial probability" required by the statute for pre-indictment restraining orders. Therefore, the ex parte restraining order authorized by the statute would rest entirely on allegations that have not even been scrutinized in an ex parte proceeding.

Thus, the private interest affected calls for the highest level of procedural protection, and the risk of error under the procedures provided by the statute is unacceptably high. Even if the government had a most compelling interest, it might not be sufficient to overcome the defendant's right to an adversarial hear-

5 The district court below offered to allow Monsanto to use a portion of his restrained assets to pay private counsel at Criminal Justice Act, 18 U.S.C. § 3006A, ("C.J.A.") rates, but this decision did not significantly further Monsanto's constitutional interests, because he was unable to secure privately retained counsel willing to work for that level of compensation. Pet. App. at 51a, 53a. Monsanto became eligible for C.J.A. counsel in any event when the restraining order reduced him to indigency.

ing, but the government does not have such an interest at stake here.

Congress adopted the policy of criminal forfeiture to punish a particular class of criminals and to "strip offenders and organizations of their economic power." Sen. Rep. 98-225, *supra*, at 191. When that punishment is imposed prior to conviction, at a time when a defendant must be presumed innocent, criminal forfeiture "too closely resembles the Alice-in-Wonderland Queen's 'sentence first, verdict afterward' mode of justice." Pet. App. at 10a (Oakes, J., concurring). There is no public interest at stake here that affects the public safety or can otherwise justify punishment before trial. *Compare United States* v. *Salerno*, 481 U.S. 739 (1987) (allowing pre-trial detention to protect public safety, but providing elaborate procedural protection).

At oral argument below, the government conceded that it has no revenue-raising interest in potentially forfeitable assets under § 853. Pet. App. at 15a (Winter, J., concurring). Even if the government had an interest in raising revenue under the statute, that interest would not outweigh the defendant's liberty interest in due process.

We do not argue here that defendants should be given access to funds that would allow them to continue alleged criminal activities. Indeed, we do not argue in this case that defendants must be given free access to their funds for any purpose whatsoever. Rather, we argue that funds that are necessary to pay attorneys' fees cannot constitutionally be restrained without at least a hearing, which is one of the essentials of due process.

Every circuit that has directly considered the question has held that to the extent that the statute authorizes ex parte restraining orders, it violates the Fifth Amendment due process rights of accused persons who lack other funds with which to hire an attorney.[6] Only one court has directly held to the contrary.[7]

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6 *United States* v. *Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988) (but affirming decision below where the judge exempted funds to pay a private attorney); *United States* v. *Harvey*, 814 F.2d 905, 928 (4th Cir. 1987), *rev'd on other grounds on reh. en banc*, *Caplin & Drysdale*, *supra*, 837 F. 2d 637; *Accord*, Pet. App. at 24a (Miner, J., concurring in part, dissenting in part); Pet. App. at 66a; *United States* v. *Crozier*, 777 F.2d 1376 (9th Cir. 1985) (reading in F.R.C.P. Rule 65); *United States* v. *Thier*, 801 F.2d 1463 (5th Cir. 1986), *modified*, 809 F.2d 249 (5th Cir. 1987) *reaff'd sub nom. United States* v. *Jones*, 837 F.2d 1332 (5th Cir. 1988), *reconsideration en banc granted*, 844 F.2d 215 (5th Cir. 1988) (declining to rule on the statute's constitutionality, but reading in Rule 65); *United States* v. *Lewis*, 759 F.2d 1316 (8th Cir.), *cert. denied*, 474 U.S. 994 (1985) (applying Rule 65); *Kiser*, *supra*, 853 F.2d 1445 (civil forfeiture affecting ability to hire criminal defense attorney).

(*Footnotes 6 and 7 continue on next page*)

C. Courts May Not Rewrite the Statute In Order To Save It By Inserting a Hearing Requirement.

Since Congress failed to provide the post-indictment hearing which we have shown to be required by due process when the statute is applied to attorneys' fees, the statute is unconstitutional. A number of courts, including the original panel below, have attempted to save the statute by rewriting it to introduce a hearing requirement.[8] In doing so, they violate the separation of powers.

The task of amending unconstitutional statutes belongs exclusively to the legislative branch. The principle that a court

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(*Footnotes 6 and 7 continued from previous page*)

7 *United States* v. *Draine*, 637 F. Supp. 482 (S.D. Ala. 1986). Where circuit courts have sustained ex parte restraining orders under the criminal forfeiture statute, they were not presented with claims involving the Sixth Amendment right to counsel of choice or no due process questions were raised. *United States* v. *Musson*, 802 F.2d 384 (10th Cir. 1986) (an ex parte order based on an indictment does not violate due process where the only issue is alienation of property because there is no Sixth Amendment claim); and *United States* v. *Nichols*, 841 F.2d 1485, 1491 n.4 (10th Cir. 1988) (sustaining a restraining order against Sixth Amendment claims but noting that appellees failed to raise a due process question). Similarly, in *Caplin & Drysdale*, the Fourth Circuit explicitly noted that it was not confronted with a due process challenge, and observed that any general objection to forfeiture "must be based on the *procedures* involved." 837 F.2d at 644.

8 *E.g.*, Pet. App. at 64a-66a; *United States* v. *Rogers*, *supra*, 602 F. Supp. at 1342-44; *United States* v. *Thier*, *supra*, 801 F.2d 1463.

confronted with an unconstitutional statute must strike it down, and may not rewrite it in conflict with clear congressional intent is so well established that it would hardly need more than a passing mention absent the original panel's opinion below. This Court has stated that although it

> 'will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute' or judicially rewriting it . . . To put the matter another way, this Court will not consider the abstract question of whether Congress might have enacted a valid statute but instead must ask whether the statute that Congress did enact will permissibly bear a construction rendering it free from constitutional defects.

Aptheker v. *Secretary of State*, 378 U.S. 500, 515 (1964), *quoting Scales* v. *United States*, 367 U.S. 203, 211 (1961).

When a Court holds that a statute offends the Constitution, it must leave to the legislature the task of attempting to effect a cure. "Statutes should be construed to avoid constitutional questions, but this interpretive canon is not a license for the judiciary to rewrite language enacted by the legislature." *United States* v. *Albertini*, 472 U.S. 675, 680 (1985). *See Sedima, S.P.R.L.* v. *Imrex, Co., Inc.*, 473 U.S. 479, 493 n.11 (1985).

Where statutes fail to provide the hearings that are an essential part of due process, the principle of separation of powers embedded in our Constitution requires that a court invalidate the statute and leave any remedial efforts to the legislature. Thus, for example, when this Court struck down a state's motion picture censorship statute in *Freedman* v. *Maryland*, 380 U.S. 51 (1965) it merely articulated the nature of the procedural safeguards that were lacking. The Court explained that "[h]ow or whether Maryland is to incorporate the required procedural safeguards in the statutory scheme is, of course, for the State to decide." *Id.* at 60. Similarly, when this Court invalidated a prejudgment garnishment procedure it explained, "[w]e do not sit as a super-legislative body. In this case the sole question is whether there has been a taking of property without that procedural due process that is required by the Fourteenth Amendment." *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 339 (1969). In *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), this Court explained that the specific requirements for hearings "are legitimately open to many potential variations and are a subject, at this point, for legislation—not adjudication." *Id.* at 96-97.

The efforts of the original panel below to craft a hearing amply demonstrate why courts are not free to remedy legislative defects, for it is no simple task to do so. The panel needed to consider such problems as who would represent a defendant at the hearing; how that attorney would be paid; the government's burden of proof; the post-trial forfeiture of fees not reached by any restraining order; and invasion of forfeitable assets to pay private attorneys at C.J.A. rates. Pet. App. at 64a-71a. Most of these are questions that the legislative branch is uniquely suited, and empowered, to decide. *See* Pet. App. at 24a (Miner, J., concurring in part, dissenting in part).

Some courts have attempted to avoid the pitfalls of judicial legislation by reading the requirements of Rule 65 of the Federal Rules of Civil Procedure into the statute.[9] This effort nonetheless fails to satisfy the principle of separation of powers. Rule 65 applies to civil hearings, while the restraint in question here takes place in the context of a criminal trial, attended by criminal punishment. Thus, a court which reads a rule designed for civil proceedings into a criminal statute is legislating just as much as a court that creates a hearing from whole cloth. In addition, the application of Rule 65 violates the requirements of due process. Because Rule 65 is a civil rule, it does not place an adequate burden of proof on the government. The balancing of interests required under Rule 65 does not offer the same protection as a heightened burden of proof. *See* Section III, A below.

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9 *United States* v. *Crozier*, *supra*, 777 F.2d 1376; *United States* v. *Thier*, *supra*, 801 F.2d 1463; *United States* v. *Lewis*, *supra*, 759 F.2d 1316. *Accord United States* v. *Rogers*, *supra*, 602 F. Supp. at 1344 (Rule 65 provides a useful analogy).

The en banc Court of Appeals below correctly rejected the efforts of the Second Circuit panel to graft a hearing requirement onto the criminal forfeiture statute. The judgment of the court below should be affirmed because the statute violates the Fifth Amendment by failing to provide a timely and adequate hearing; the remedy lies exclusively with the legislative branch.

III. IF THIS COURT READS A HEARING REQUIREMENT INTO THE STATUTE, IT SHOULD PRESCRIBE CONSTITUTIONALLY ADEQUATE PROCEDURAL PROTECTIONS. THE SECOND CIRCUIT PANEL BELOW FAILED TO DO SO.

If this Court should hold that the statute may constitutionally be applied to attorneys' fees by reading a post-indictment hearing into the statute, it should provide a hearing that is constitutionally adequate. The Second Circuit panel below, subsequently reversed by the en banc Court of Appeals, clearly failed to do so.

Amici are not convinced that it would ever be possible to devise a fundamentally fair pre-trial hearing to determine whether the evidence at trial will retroactively justify stripping the accused of the assets he needs to obtain the assistance of chosen counsel at that same trial. As practicing lawyers, *amici* understand the enormous imbalance in resources and preparation that will characterize any pre-trial hearing. The government's formidable advantages and resources—including immunity, plea bargains and sentence reductions for favorable witnesses, compulsory process, and grand jury secrecy—marshalled over years of preparation for indictment, will be brought to bear to deprive an accused person, still shattered by his recent arrest, of the ability to retain a lawyer. The accused must find an advocate willing to undertake a momentous proceeding, with little opportunity to prepare, and without his customary fee in hand.

Even if those fundamental concerns could be addressed, it may be that the government could never show an interest sufficient to overcome a defendant's rights in the context of a hearing that required a balancing of the interests at stake, which the original Second Circuit panel did not do. This Court need not reach that question, however, because the original Second Circuit panel failed to provide the minimum procedural protections that due process mandates.

The hearing crafted by the panel below as an admitted "compromise" is inadequate in two major respects. Pet. App. at 64a. First, it assigns an inadequate burden of proof to the government. Second, it is deficient because it suspends the Rules of Evidence that normally apply in federal criminal proceedings and allows reliance on hearsay evidence. Both of these deficiencies create an unacceptably high risk of error given the constitutional interests at stake.

A. A "Clear and Convincing Evidence" Standard of Proof Is Required.

The length and severity of the potential deprivation are important factors in determining the appropriate standards for hearings. *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, 606 (1975). In this instance, if the government prevails, the defendant will be permanently deprived of his right to counsel of choice, and will be stigmatized prior to conviction as a person who is likely to have committed particularly offensive crimes. Surely he is entitled to a standard of proof that recognizes the magnitude of the risks he faces.

The panel below required the government to support its request for a pre-trial restraining order by showing a mere "likelihood" of success. Pet. App. at 68a. This standard belittles the magnitude of the defendant's interests. Ordinarily, the highest standard of proof—proof "beyond a reasonable doubt"—is applied where criminal punishment is at issue, as it is here. *See* above at 15, 18.

If this Court determines that the highest standard should not apply here, it should require an intermediate standard of proof. This Court has mandated an intermediate standard of proof—"clear and convincing evidence"—when the interest at stake was "particularly important" and "more substantial than mere

loss of money." *Santosky* v. *Kramer*, 455 U.S. 745, 756 (1982) (termination of parental rights); *Addington v. Texas*, 441 U.S. 418 (1979) (civil commitment proceedings); *Woodby* v. *INS*, 385 U.S. 276 (1966) (deportation); *Chaunt* v. *United States*, 364 U.S. 350 (1960) (denaturalization).

The Court has concluded that a clear and convincing level of certainty is required to preserve fundamental fairness in proceedings where the government is threatening an individual with a "significant deprivation of liberty" or "stigma." *Santosky* v. *Kramer*, *supra*, 455 U.S. at 756, *quoting Addington v. Texas*, *supra*, 441 U.S. at 424. Both threats undeniably obtain here.

Society should not be neutral in allocating risk at a post-indictment hearing.[10] Preservation of basic constitutional rights, including the right to counsel of choice, is a social imperative. Moreover, the risk of error here is far greater than in comparable civil proceedings. A disparity in resources is likely to characterize a pre-trial hearing where the government may have been preparing an indictment for years while the defendant has just been indicted and has no opportunity for discovery. *Santosky* v. *Kramer*, 455 U.S. at 761-65.

Therefore a standard of proof at least as stringent as the "clear and convincing" evidence standard is constitutionally required.

B. The Federal Rules of Evidence Must Apply.

Application of the Rules of Evidence would promote an inquiry into whether the evidence presented by the government is clear and convincing.[11] Fundamental fairness requires the

10 In a civil proceeding, by contrast, society is neutral as to the allocation of the risk of error between the parties. *In Re Winship*, 397 U.S. 358, 371 (Harlan, J., concurring).

11 The Federal Rules of Evidence by their own terms apply "generally" to criminal proceedings. Fed. R. Ev. 1101 (b). The Rules spell out a series of exceptions including grand jury proceedings, preliminary examinations in criminal cases and bail proceedings, which are consistent with the provision in 21 U.S.C. § 853(e)(3) that the Rules should not apply in the context of a pre-indictment hearing. Fed. R. Ev. 1101 (d). There is no exception for criminal forfeiture hearings.

right to confront one's accusers, and to probe the veracity of the statements made to the factfinder. *Greene* v. *McElroy*, 360 U.S. 474 (1959). When the panel below indicated that hearsay would be admissable at a pre-trial hearing, it invited the government to present critical evidence in an unreliable and virtually unimpeachable form. *See* Pet. App. at 71a.

The Congressional decision to dispense with the Rules of Evidence in the context of a pre-indictment hearing under 21 U.S.C. § 853(e)(3) is distinguishable since a defendant's constitutional right to counsel does not attach until after indictment. *Kirby* v. *Illinois*, 406 U.S. 682, 688-90 (1972). Therefore, the Ninth Circuit correctly concluded that the Federal Rules of Evidence should apply at a post-indictment forfeiture hearing. *United States* v. *Spilotro*, 680 F.2d 612, 619 n.4 (9th Cir. 1982).

Ironically, if this were an ordinary preliminary injunction in the civil context governed by Rule 65 of the Federal Rules of Civil Procedure, where the constitutional right to counsel were not at stake, the defendant would receive the full panoply of evidentiary rights, including the right to cross-examine the witnesses against him. A criminal defendant deserves at least as much procedural protection here, where constitutional rights are at risk.

IV. EVEN IF THIS COURT DECLINES TO HOLD THAT ATTORNEYS' FEES ARE ENTIRELY IMMUNE FROM FORFEITURE, IT SHOULD HOLD THAT ATTORNEYS' FEES ARE IMMUNE FROM RECAPTURE AFTER TRIAL.

Preservation of the adversary system in the criminal arena requires that funds paid to attorneys be exempt from post-trial recapture by the government pursuant to 21 U.S.C. § 853(c).

The issue of post-trial recapture of fees paid to attorneys may arise in two ways. The first, represented by the circumstances confronting Monsanto, occurs when the government has sought, and been denied, a restraining order reaching attorneys' fees prior to trial. The en banc Second Circuit Court of Appeals correctly held that where a court releases funds needed to pay

attorneys' fees, those fees should be exempt from subsequent forfeiture. Presumably, any other approach would render the release of funds to pay attorneys a meaningless gesture, because no attorney could rely on such fees.

In the second instance, the government may choose not to seek a restraining order, and then seek to recapture funds from attorneys after trial. Since attorneys cannot argue persuasively that they lacked notice of potential forfeiture, this approach would be just as effective as a restraining order in deterring members of the private bar from appearing on behalf of persons accused of violating statutes that provide for criminal forfeiture.

Caplin & Drysdale, which arose in a different posture, is informative. When the Fourth Circuit sitting en banc held that if attorneys do not qualify as bona fide purchasers under the statute they cannot collect their fees from the court, it issued a warning to attorneys that they cannot look forward to prospective compensation if their clients are convicted. The reasoning of the Fourth Circuit further confirms the speculation that attorneys would rarely succeed under the statute in resisting government efforts to recapture fees they have already received.

Since the specter of recapture would render meaningless any post-indictment exemption for attorneys' fees, thereby effectively preventing defendants from retaining counsel of choice, and since the threat of recapture would create conflicts between attorneys and their clients, post-trial recapture impermissibly impinges on Sixth Amendment interests. The holding of the Second Circuit sitting en banc should be affirmed.

CONCLUSION

For the foregoing reasons, the ruling of the Second Circuit en banc should be affirmed.

Dated: January 5, 1989

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STATEMENT OF INTERESTS

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit

corporation with a membership of more than 5,000 lawyers, including citizens of every state. Members serve in positions bringing them into daily contact with the criminal justice system as advocates, law professors, or judges of the state or federal courts. The NACDL is the only national bar organization working on behalf of public and private defense lawyers. The NACDL is thus uniquely able to express the concern of criminal defense attorneys and their clients about what it considers to be the unauthorized and unconstitutional use by the Department of Justice of the Comprehensive Forfeiture Act of 1984 to restrain or forfeit assets needed by the accused to retain private counsel of his or her own choosing. The NACDL is concerned that the power claimed by the Department of Justice poses a grave danger to our adversary system of justice. The NACDL has appeared in fee forfeiture cases as amicus curiae

and has provided testimony on that subject to the United States Congress.

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization with over 250,000 members. The New York Civil Liberties Union (NYCLU) and the American Civil Liberties Union of Virginia (ACLU of Virginia) are the state affiliates of the ACLU in the two states in which the present actions arose. The ACLU was founded in 1920 as an organization dedicated to the defense of individual rights. In pursuit of that goal, the ACLU and its state affiliates frequently appear in federal and state courts throughout the country. Among the most fundamental of liberties is the right of an accused to the assistance of counsel, without which the assertion of other constitutional rights by the accused would be rendered virtually meaningless. In the view of ACLU and its state affiliates, the primary and preferred

method of exercising the right to counsel is through the retention of counsel of choice. This fundamental right, so critical to our adversary system, is placed at grave risk by the application of forfeiture statutes to legitimate attorneys' fees.

The National Network for the Right to Counsel (NNRC) is a national organization established in early 1986 to defend the right to counsel against government intrusion and abridgement. The NNRC has filed amicus briefs in fee forfeiture cases and in other cases involving the protection of attorney-client relationships. The NNRC has also co-sponsored conferences on these issues at Harvard Law School and New York University School of Law, attended by members of the bar, the judiciary, law school faculties, state legislatures, and the United States Congress. The NNRC shares the concern of other amici curiae that the burgeoning deployment of forfeiture

statutes by prosecutors to deprive accused persons of assets needed to hire defense counsel threatens basic values of our society and should, therefore, be stopped.

INTRODUCTION TO AND SUMMARY OF ARGUMENT

This point is elemental: The Sixth Amendment guarantee that "the accused shall enjoy the right to have the Assistance of Counsel for his defence" establishes a substantive guarantee prohibiting the Sovereign from using unproven forfeiture allegations to defeat the ability of the accused to employ private counsel of his or her own choosing. The right to use one's own property to hire one's own counsel is the primary and preferred Sixth Amendment right. The trial of John Peter Zenger, which epitomizes that right, was the model our Founding Fathers had in mind.

The Government argues that the right of the accused to be defended by counsel of

his own choosing is such a weak and qualified right that it can be defeated by the simple expedient of seeking to forfeit the assets of the accused. The Government insists that the accused is not prejudiced by its freezing his chosen Champion from appearing, because the Sovereign will select a replacement for him--an appointed counsel.

We answer that freedom to choose one's own advocate is a cherished right, dignified by our history and traditions. The right to counsel of choice protects and promotes a host of values such as the autonomy of the citizen accused; his trust and confidence in defense counsel; salutary participation by the accused in the legal process; a strong and independent adversary system; accuracy in decisionmaking; free expression of advocacy in an important public forum; and public confidence in the fairness and integrity of the criminal

justice system. Thus, the right to hire defense counsel of one's own choosing is distinct and separate from the right to have some lawyer (any lawyer) appointed by the court. Lawyers are not fungible commodities.

No right--not even free speech--is absolute; but it takes an extraordinary, compelling state interest to totally abridge the right to counsel of choice, as the application of the forfeiture provisions would do here. The Government's interest in forfeiture does not suffice, at least where the attorneys' fees involved are legitimate; that interest is fully met by limiting forfeiture to sham or fraudulent transfers to attorneys or others.

The Government's only legitimate interest justifying such forfeiture pursuits is to strip wrongdoers of their ill-gotten gains and their power to commit future crimes. Forfeiture is not sanctioned as a

vehicle for raising revenue to support the Government. Forfeiture is not licensed as a device for shunting skilled but ethical lawyers away from our criminal courtrooms. Accordingly, the Government's proper interest is not frustrated by releasing some of the assets to defense counsel. By "forfeiting" these assets to the lawyer, the accused is separated from his property--whether ill-gotten or otherwise; and the defendant's freedom to have counsel of choice is accommodated. This reconciliation of the Government's interests and the defendant's rights also protects the public interest in preserving an independent private defense bar and safeguarding our adversarial system of justice.

Unless the forfeiture statutes are read to allow this accomodation of the defendant's right to retain counsel, they violate the Sixth Amendment. Alterna-

tively, if the Court is not certain whether Congress really decided to grant Executive Branch prosecutors such awesome, unfettered discretion to aim these statutes at their adversaries, it should hold ultra vires the application of forfeiture authority to legitimate attorneys' fees in criminal cases. Basic principles of statutory construction compel this result. E.g., Thompson v. Oklahoma, 487 U.S.---, 108 S. Ct. 2687, 2706, 101 L.Ed. 2d 702, 728 (1988) (O'Connor, J., concurring); Kent v. Dulles, 357 U.S. 116 (1958); N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).

We are deeply concerned about the prosecution's trailblazing use of forfeiture to cripple the accused before the trial has even started. Its chief legal theory, the "relation back" doctrine, is argued as if punishment first and trial later were acceptable procedure. United States v. Monsanto, 852 F.2d 1400, 1404 (2d

Cir. 1988) (en banc) (Oakes, J., concurring) (alluding to L. Carroll, Through the Looking Glass and What Alice Found There (1896)). The defendant is presumed guilty. This theory not only "completely begs the question," United States v. Unit No. 7 and Unit No. 8, (Kiser), 853 F.2d 1445, 1451 (8th Cir. 1988); by shackling the accused in making his defense, it also threatens to become a self-fulfilling prophecy.

In the short run, the Department of Justice's theory will remove private counsel from many of those cases where their skills are most needed. All prosecutions which can be made into a RICO case. See 18 U.S.C. § 1961(1) (the ever-growing list of RICO predicate crimes). All CCE drug cases. 21 U.S.C. § 848. But the criminal forfeiture amendments do not apply just to CCE drug cases. They apply to all felony drug cases. 21 U.S.C. § 853(a).

In the long run, the DOJ's experiment

threatens to wreck the adversary system of justice. Criminal and civil forfeiture is being urged as the latest answer in the war on crime, and use of forfeiture is rapidly expanding. More forfeiture laws surely will be enacted. Further, if the Government can use forfeiture theory to freeze or seize assets before they are wielded in defense of the accusations or void the payment to counsel after the trial is over, the principle will not stop there. The prosecution may well next claim necessity to seize the defendant's assets so that they will be available to pay fines and make restitution. Given the 1984 burst in the size of federal felony fines to $250,000 per count for individuals, 18 U.S.C. § 3571(b), and the authorization of alternative fines based on pecuniary gain to the defendant or loss to the victim, doubled, 18 U.S.C. § 3571(d), few accused persons will be able to enjoy the assis-

tance of retained counsel. Given the penchant of the States to follow the Federal example, all these pernicious practices will spread. Eventually, they will be ubiquitous. The power to accuse will entail the power to paralyze the financial resources of the defendant and--for the crucial practical purpose of defending against the accusations--to render the defendant a pauper at the bar of justice. Then, we fear, the prosecution will be able to exclude private counsel for almost any person accused of any felony in any court. When that day arrives, we will have nationalized the Sixth Amendment and socialized the criminal defense practice. No wonder the American Bar Association, present amici curiae and most of the legal community are so alarmed. If we do not want to see that day, the Government's experiment must be stopped here and now.

We do not rely upon rhetoric. An

overwhelming body of law and logic repel the Government's onslaught.

A R G U M E N T

I. APPLICATION OF FORFEITURE PROVISIONS TO LEGITIMATE ATTORNEYS' FEES UNCONSTITUTIONALLY INFRINGES ON THE SIXTH AMENDMENT RIGHT TO COUNSEL OF CHOICE AND THREATENS TO UNDERMINE THE ADVERSARY SYSTEM OF JUSTICE

A. The Fundamental Right to Counsel of Choice

Although like many fundamental constitutional rights, the right to counsel of choice may not be absolute, and may depend on the financial resources of the individual who seeks to exercise it, the right is unquestionably an "essential component" or "essential element" of the Sixth Amendment. E.g., United States v. Phillips, 699 F.2d 798, 801 (6th Cir. 1983), rev'd on other grounds, 733 F.2d 422 (6th Cir. 1984) (en banc). Moreover, although the right to appointed counsel is now recognized, Gideon

v. Wainwright, 372 U.S. 335 (1963), the right to counsel of choice was the primary right the Sixth Amendment was designed to protect. This is revealed by an examination of the historical origins of the Amendment, and of the most celebrated trial of the colonial period, the trial of John Peter Zenger, which stands as a vindication of the right to retain counsel of choice and an early demonstration of the importance of that right.

In essence, the Sixth Amendment was a reaction against the prior English practice which prohibited counsel in serious criminal cases. The defendant was required to "appear before the court in his own person and conduct his own cause in his own words." Faretta v. California, 422 U.S. 806, 823 (1975) (quoting 1 F. Pollock & F. Maitland, The History of the English Law 211 (2d ed. 1898)); Argersinger v. Hamlin, 407 U.S. 25, 30 (1972); Betts v. Brady,

316 U.S. 455, 466 (1942); Powell v. Alabama, 287 U.S. 45, 60 (1932); W. Beaney, The Right to Counsel in American Courts 8-10 (1955). The English common law practice of prohibiting a defendant from being represented by counsel in felony and treason cases was "so outrageous and so obviously a perversion of all sense of proportion that the rule was constantly, vigorously and sometimes passionately assailed by English statesmen and lawyers." Powell, 287 U.S. at 60.

The English rule was clearly rejected by the colonies even before adoption of the federal Constitution. See Holden v. Hardy, 169 U.S. 366, 386 (1898) ("to the credit of [England's] American colonies let it be said, that so oppressive a doctrine had never obtained a foothold there."). Thus, at the time of the adoption of the federal Constitution, the constitutions of the states guaranteed "that a defendant is not

to be denied the privilege of representation by counsel of his choice." Betts, 316 U.S. at 468. It was protection of the right to counsel of choice that the Sixth Amendment contemplated when it guaranteed the right of the accused "to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. By rejecting the English practice that had denied the accused the right to appear through counsel in felony and treason cases, "[t]he Sixth Amendment extended the right to counsel beyond its common law dimensions." Argersinger, 407 U.S. at 30. The Amendment was not, however, regarded as providing a right to appointed counsel. Bute v. Illinois, 333 U.S. 640, 660-66 (1948); W. Beaney, supra, at 28-29. The right to counsel it protected was "the right to retain counsel of one's own choice and at one's own expense." Id. at 21; see Bute at 661. 3 J. Story, Commentaries on the Constitution

606 (1833) (the "right to have . . . counsel employed for the prisoner").

Moreover, the colonists would have been surprised, to say the least, at the notion that a defendant could be deprived of the right to retain his own counsel and ordered to stand trial instead with counsel selected by the court. The most famous trial of the colonial era, one that had a profound effect on the Framers--the trial of printer John Peter Zenger--stands as a vindication of the right to appear through chosen counsel rather than one appointed by the court.*

Zenger was tried in the colony of New York in 1735 for seditious libel based on his printing a newspaper critical of the Governor of the colony, the tyrant William Cosby. See generally J. Alexander, A Brief Narrative of the Case and Trial of John

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*To our knowledge, the Zenger trial has not been brought to the attention of any court in any previous fee forfeiture litigation which has reached judgment.

Peter Zenger, Printer of the New York Weekly Journal (S. Katz ed. 2d ed. 1972) (hereinafter cited as "Katz"); The Trial of Peter Zenger (V. Buranelli ed. 1957); L. Rutherfurd, John Peter Zenger: His Press, His Trial and a Bibliography of Zenger's Imprints (1904). Two noted New York lawyers who had been leaders in the political movement opposing Cosby, James Alexander and William Smith, came to Zenger's defense. Judge James DeLancey, a Cosby lieutenant appointed by the Governor as Chief Justice of the New York Supreme Court, presided at the trial. He rebuffed the lawyers' attempts to win Zenger's release and set an excessive bail. When the defense attorneys challenged DeLancey's authority to act as judge, DeLancey responded by disbarring them. This unprecedented order disbarring Alexander and Smith was a partisan "tactic to deprive Zenger of competent legal counsel, since

there were few lawyers in New York at the time and probably none so skilled as Smith and Alexander." Katz, supra, at 21.

Following the disbarment of his attorneys, Zenger, without funds, immediately petitioned the court for appointment of counsel. DeLancey obliged him by appointing John Chambers, "a competent lawyer but a Governor's man." Katz, supra, at 21. Zenger's allies were concerned, and Alexander and Smith began to look for another lawyer to try the case. Alexander, although disbarred, had continued to work on the case, and developed a more daring strategy than the conventional one conceived by Chambers. The plan was to base Zenger's defense on the truth of the newspaper articles, trying Cosby in the process, and on that basis to seek a jury acquittal on the libel charges. Alexander engaged Andrew Hamilton, a distinguished attorney from the neighboring colony of

Pennsylvania, to execute the defense plan.

Hamilton took over the defense following Chambers' opening statement and made an impassioned plea to the jury in support of the liberty to expose and oppose tyranny by speaking and writing truth. Admitting that Zenger had published the statements in question, he asserted that the printer could not, however, be convicted of libel for printing the truth. Judge DeLancey instructed the jury that it was to determine only whether Zenger had published the statements, leaving the law of libel to the court. But the jury acquitted Zenger.

Had Judge DeLancey prohibited Zenger's representation by counsel of choice and insisted on Zenger appearing through the young court-appointed lawyer, an important chapter in American history would have been different. The trial of John Peter Zenger played a significant role in establishing the American tradition of an independent

criminal defense bar serving as a meaningful check against a partisan or corrupt judge or prosecutor. The Zenger trial and the importance of the right to representation by counsel of choice were fresh in the minds of the Framers when they drafted the Sixth Amendment.

Long before it was regarded as a source for the right to appointed counsel, the Sixth Amendment thus guaranteed the fundamental right to retain counsel of choice. Indeed, when this Court in 1932 first recognized a qualified right to appointment of counsel in capital cases as a matter of due process, it referred to it as "a logical corollary from the constitutional right to be heard by counsel." Powell, 287 U.S. at 72. And in 1942 in discussing the right to self-representation the Court referred to the Sixth Amendment as embodying "the correlative right to dispense with a lawyer's help." Adams

v. United States ex rel. McCann, 317 U.S. 269, 279 (1942), cited with approval in Faretta, 422 U.S. at 815. If the right to appointment of counsel and the right to self-representation are "corollaries," then the right to be heard by counsel of choice must be the primary right.

This basic component of the constitutional right to counsel is separate and distinct from the right to appointed counsel, which it significantly predated. The right to counsel "includes not only the right to have an attorney appointed by the State in certain cases, but also the right of an accused to 'a fair opportunity to secure counsel of his own choice.'" Crooker v. California, 357 U.S. 433, 439 (1958). "[A] defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth." Chandler v. Fretag, 348 U.S. 3, 10 (1954).

B. The Right to Counsel of Choice Is Not Satisfied by Provision of Appointed Counsel

This right to counsel of choice, so dignified by our constitutional history and traditions, would not be satisfied by the provision of appointed counsel, the result that the Government contends will fully meet the requirements of the Sixth Amendment. Even assuming that appointed counsel would provide the effective assistance of counsel mandated by the Sixth Amendment, this contention misconceives the separate and distinct nature of the right to counsel of choice. See United States v. Unit No. 7 and Unit No. 8 (Kiser), 853 F.2d 1445, 1451 (8th Cir. 1988) ("[W]e reject the government's argument that even if its action should push Kiser into indigency, the Sixth Amendment would be fully vindicated by offering him appointed counsel . . . . This is an extraordinarily impoverished view of the non-indigent's right. In

essence it collapses the two distinct rights into one, the lesser.").

The "essential aim" of the Sixth Amendment may be, as Mr. Chief Justice Rehnquist recently stated in Wheat v. United States, 486 U.S. ---, 108 S. Ct. 1692, 1697, 100 L.Ed. 2d 140, 148 (1988), "to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer who he prefers." But a criminal justice system relying on appointed rather than retained counsel would not be the adversary system contemplated by the Sixth Amendment, no matter how effective such appointed advocates were. Where the Government seeks to deprive a defendant not of a particular preferred counsel, as in Wheat, but of the opportunity to select any counsel, giving him a competent appointed lawyer will not satisfy the principles of the Sixth Amendment.

We believe that the Sixth Amendment right of the accused to hire private counsel promotes transcendent values: free choice or autonomy in a momentous contest between the citizen and the Sovereign; salutary participation in the legal process; and free expression of advocacy in a public forum. As to free choice, in other contexts the federal courts have rejected the contention that deprivation of the right to counsel of choice can somehow be cured by provision of appointed counsel:

> The government argues that Rankin was competently represented by appointed counsel at trial. That, however, is not a relevant consideration. A defendant who is arbitrarily deprived of the right to select his own counsel need not demonstrate prejudice. "Obtaining reversal for violation of such a right does not require a showing of prejudice to the defense, since the right reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding." Flanagan v. United States, 465 U.S. 259, 268 . . . (1984). In this respect, the denial of one's selected lawyer is quite

> different from a claim of ineffective counsel where a harmless error test is appropriate. The right at stake here is similar to that of self-representation. "The right is either respected or denied; its deprivation cannot be harmless." McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 . . . (1984). See also United States v. Laura, 607 F.2d 52, 58 (3d Cir. 1979) (defendant "need not show that the dismissal [of counsel] was prejudicial.").

United States v. Rankin, 779 F.2d 956, 960-61 (3d Cir. 1986). Federal courts have also held that denial of the right to counsel of choice does not require a showing of prejudice. Rather, the right is "so fundamental that any interference cannot be deemed harmless error" and must result in automatic reversal even where the defendant was provided the effective assistance of counsel through appointed counsel. United States v. Romano, 849 F.2d 812, 820 (3d Cir. 1988); accord, United States v. Panzardi Alvarez, 816 F.2d 813, 816 (1st Cir. 1987); Rankin, 779 F.2d at 960-61; Gandy v. Alabama, 569 F.2d 1318, 1323-26 (5th Cir. 1978); Wilson v. Mintzes,

761 F.2d 275, 285-86 (6th Cir. 1985); United States v. Lewis, 759 F.2d 1316, 1326-27 (8th Cir.), cert. denied, 479 U.S. 994 (1985); United States v. Ray, 731 F.2d 1361, 1365 (9th Cir. 1984).

This approach is grounded in recognition that the right to counsel of choice serves substantial interests apart from the general interest in accuracy in adjudication. "[W]ere a defendant not provided the opportunity to select his own counsel at his own expense, substantial risk would arise that the basic trust between counsel and client, which is a cornerstone of the adversary system, would be undercut." Linton v. Perini, 656 F.2d 207, 209 (6th Cir. 1981), cert. denied, 454 U.S. 1162 (1982). "[T]he right to counsel of choice, like the right to self-representation, is premised on respect for the individual . . . ." Mintzes, 761 F.2d at 286. See Faretta, 422 U.S. at 835 (recognizing

right of self-representation out of "that respect for the individual which is the lifeblood of the law."). The defendant's basic right to choose the type of defense he wishes to mount also supports the right to select counsel of choice, "[f]or the most important decision a defendant makes in shaping his defense is his selection of an attorney." United States v. Laura, 607 F.2d 52, 56 (3d Cir. 1979). Moreover, "the ability of a defendant to select his own counsel permits him to choose an individual in whom he has confidence. With this choice, the intimacy and confidentiality which are important to an effective attorney-client relationship can be nurtured." Id. at 57; ABA Standards for Criminal Justice 4-29 (2d ed. 1980) (commentary) ("Nothing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence."). None of these policies underlying the right to

counsel of choice would be satisfied by the right to appointed counsel or by the right to the effective assistance of counsel, "since, unlike the right to counsel of choice, 'the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.'" Mintzes, 761 F.2d at 285 (quoting United States v. Cronic, 466 U.S. 648, 658 (1984)).

In this respect, the right to the assistance of counsel of choice is like the right to self-representation, see Rankin, 779 F.2d at 960-61, and like that right, its deprivation cannot be remedied by the provision of appointed counsel, no matter how competent such appointed counsel may be. See Faretta, 422 U.S. at 820 ("To thrust counsel upon the accused against his considered wish,

thus violates the logic of the [Sixth] Amendment"); id. at 833 ("the notion of compulsory counsel was utterly foreign" to the Founders). Without some compelling justification, forcing a public defender or other appointed counsel on a defendant otherwise able to hire his own counsel and desiring to do so thus would infringe the Sixth Amendment. Requiring such an unwanted counsel instead of the counsel of defendant's choice would be as offensive to the Sixth Amendment as insisting on unwanted counsel when defendant's choice is self-representation. "An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed by the Constitution, for, in a very real sense, it is not his defense." Faretta, 422 U.S. at 821 (emphasis by the Court).

Allowing the defendant to select his own counsel honors his right to free choice and autonomy in a matter of vital concern to him, see Faretta, 422 U.S. at 806-07 ("those who wrote the Bill of Rights . . . understood the inestimable worth of free choice."), and best effectuates the values underlying the right to counsel by maximizing the trust and confidence between client and attorney that are preconditions to its successful exercise.

Permitting the accused to select his own counsel also promotes his interest in having assistance independent of the Sovereign which is prosecuting him and judging him. It further promotes the public interest in preserving an independent private criminal defense bar. In our system of justice it is essential that judges be independent, see The Federalist No. 78 (Hamilton), in The Federalist Papers 226 (R. Fairfield ed. 1961), that juries be

more independent, see Duncan v. Louisiana, 391 U.S. 145, 155-56, (1968), and that defense counsel be most independent.

On the other hand, forcing the accused to have lawyers selected, recruited, trained, paid and/or supervised* by the Sovereign defies the value of free choice, jeopardizes independence, and undermines the defendants' trust in the system and their reconciliation with any adverse results of the proceedings. Cf. Polk County v. Dodson, 454 U.S. 312, 325 n.17 (1981) ("Our adversary system functions best when a lawyer enjoys the whole-hearted confidence of his client.") And, in the long run, allowing the prosecution to keep private defense counsel out of major criminal trials will destroy public confidence in the impartiality and integrity of

*The reality, of course, is that many public defender offices and most court appointment systems lack adequate capacity to recruit, train and supervise their lawyers as professionals.

our system of justice.*

Speaking of the public interest, permitting representation through counsel of choice promotes precious values of public advocacy. The use of counsel by a criminal defendant to assert rights on his behalf is protected by the First Amendment "right to hire attorneys on a salary basis to assist . . . in the assertion of . . . legal rights." See, e.g., United Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217, 222 (1967); accord, Matter of Abrams, 62 N.Y.2d 183, 196, 476 N.Y.S.2d 494, 500-01, 405 N.E.2d 1, 7 (1984) (First Amendment protects criminal defendant's

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*We are also concerned about the terrible ethical problems unleashed by the prosecution's use of the forfeiture statutes to pursue assets the accused needs to hire private defense counsel. Application of the forfeiture statutes to legitimate attorneys' fees would totally destroy the right to counsel of choice by rendering private counsel financially and ethically unable to represent clients in such cases. These considerations are ably presented in the Brief Amicus Curiae of the American Bar Association in Support of the Petitioner Caplin & Drysdale in No. 87-1729 and the Respondent Monsanto in No. 88-454, so we need say no more.

right to counsel of choice). Moreover, what is said in the courtroom--as public a forum as there is, see, e.g., Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) --is a matter of vital First Amendment concern. From the John Peter Zenger trial to this very day, who appears in court and what he or she advocates there makes an enormous difference to the justice system and to our entire society. By keeping any advocate chosen by the accused from ever entering the door of the courtroom, the Government's actions have barred from this marketplace of ideas the communications of the defendant--the object of the controversy--in the form and by the advocate he has chosen to make them. Instead of the free market of ideas that the right to counsel of choice best promotes, the Government would substitute the public monopoly of appointed counsel. Restricting this vital forum to public defenders or

court-appointed lawyers would be analagous to permitting newspapers to report whatever a political candidate wished to communicate to the public, but requiring that all reporters be either government employees or free-lance reporters selected by the government and paid at substantially below market rates. Our traditions of free choice, free enterprise and free speech prohibit restricting expression or advocacy to such state-controlled channels.

In sum, a defendant's Sixth Amendment rights may be exercised in one of three ways--he may choose a private counsel, the court may appoint an attorney for him, or he may decline counsel and represent himself. Of the three, the first is the primary method; it is the one envisioned by the Framers of the Sixth Amendment and the one with the longest history of constitutional recognition. Moreover, of the

three, it is the preferred method; neither appointed counsel nor self-representation conform as closely to our model of the adversary system, see Herring v. New York, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."), nor do they effectuate as well the goals of promoting accuracy, fairness, and public acceptance of the criminal justice process that the Sixth Amendment seeks to serve.

C. Deprivation of the Right to Counsel of Choice Requires Compelling Justification

The discussion above demonstrates that the right to counsel of choice is a fundamental right. It cannot be denied without compelling justification. United States v. Monsanto, 852 F.2d 1400, 1402 (2d Cir. 1988) (Chief Judge Feinberg, writing

for himself and Judges Oakes and Kearse).

It is no answer that a defendant denied this right may receive appointed counsel conforming to the "effective assistance of counsel" standard. Moreover, the fact that the right to choose counsel is available only to those with sufficient resources to exercise the right does not justify the Government depriving the defendant of the resources that he would otherwise possess and that are ample to exercise the right. United States v. Unit No. 7 and Unit No. 8 (Kiser), 853 F.2d 1445, 1451 (8th Cir. 1988). Virtually all constitutional rights cost money to exercise. The right to free speech is dependent upon the individual's having sufficient resources to reach his audience. A listener's First Amendment right to receive ideas is similarly dependent upon his ability to travel to a demonstration, purchase a book, pamphlet or newspaper, or own a television.

A pregnant woman's right to choose an abortion is contingent on her having the resources to afford one. Even the free exercise of religion usually costs money. Where independent of governmental action, an individual lacks the resources to exercise these fundamental rights, the absence of state action will ordinarily preclude his assertion of a constitutional claim. On the other hand, where the individual would otherwise have sufficient resources to exercise the right, but Government acts in some way to take away those resources, the governmental action in question must be justified. Kiser, 853 F.2d at 1450-51.

Few constitutional rights, including the right to counsel of choice, are absolute. See Wheat v. United States, 486 U.S. ---, 108 S. Ct. 1692, 1697, 100 L.Ed. 2d 140, 148-49 (1988) ("The Sixth Amendment right to choose one's own counsel

is circumscribed in several important respects."). Fundamental rights like the First Amendment must yield to governmental regulation advancing a "compelling state interest." See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972) (First Amendment right to free exercise of religion). Thus, it is no answer that the defendant after forfeiture is left without sufficient assets to retain counsel of choice; rather, the question is whether the Government's freezing or seizing of his assets can be justified when balanced against the significant individual and societal interests underlying the constitutional right to counsel of choice.

In striking this balance a standard of "heightened scrutiny," demanding compelling necessity to outweigh the right to counsel of choice, is appropriate. What is at stake here is no mere regulation of the right or postponement of its exercise, for

which lesser scrutiny may suffice. Rather, what is involved is the wholesale abridgment of the right to counsel of choice. When a defendant is stripped of all his assets, his right to retain counsel of choice is not only postponed or its exercise limited by the need to accommodate the demands of the administration of justice; his ability to exercise the right is totally abridged.

For such a total abridgment to be upheld, the most compelling of justifications is required. The assertion of an important or significant governmental interest cannot alone suffice. This is the teaching of Faretta, which recognized that the Sixth Amendment right of self-representation outweighs a number of significant interests that argue against it--the interest in judicial economy and efficiency that would be furthered by requiring counsel rather than permitting an uncounseled

defendant to conduct the defense, and the societal interests in accuracy in adjudication and the appearance of fairness which inevitably suffer when there is a strong imbalance in the adversary system such as results when an uncounseled defendant alone faces a professional prosecutor. Faretta resolves the conflict between these significant interests and the defendant's Sixth Amendment right in favor of the Sixth Amendment right to self-representation which, like the right to counsel of choice involved here, was at risk of being totally abridged. See Rankin, 779 F.2d at 961; Mintzes, 761 F.2d at 286.

This Court's recent distinction of the right of self-representation protected in Faretta from the right to choose a particular counsel does not call into question the propriety of applying the strict scrutiny approach of Faretta where, as here, a wholesale abridgement of the right to

choose any counsel is at issue. In a footnote in Wheat, 108 S. Ct. at 1697 n.3, the Court stated: "Our holding in Faretta that a criminal defendant has a Sixth Amendment right to represent himself if he voluntarily elects to do so does not encompass the right to choose any advocate if the defendant wishes to be represented by counsel." (Emphasis in original.)

That the "holding" of Faretta does not "encompass" the distinct issue presented in Wheat is, of course, not surprising. Faretta did not deal at all with the right to counsel of choice, but only with the separate question of whether a defendant could waive counsel and represent himself. As a result, its holding unquestionably cannot be said to "encompass" the counsel of choice issue presented in Wheat. For the same reason, the Court's holding in Wheat--that a defendant could not choose

representation by an attorney found to be subject to an actual conflict of interest--does not "encompass" the discrete question of whether the Government may deprive a defendant of the opportunity to select any private counsel, including all private practitioners not subject to disqualifying conditions such as conflicts of interest.

Although neither the holding of Faretta nor that of Wheat "encompasses" this separate question, the approach of Faretta rather than that of Wheat is appropriate to its resolution. In both this context and that of Faretta, denial of the defendant's contention would totally destroy the right in question--self-representation in Faretta and representation by some private counsel of choice here. By contrast, rejection of the defendant's desire in Wheat, to be represented by a particular counsel found to labor under an actual conflict of interest,

still preserves the defendant's opportunity to be represented by a counsel of choice, albeit not his first choice.

Wheat is thus a case involving necessary and reasonable regulation of the exercise of the right to counsel of choice, rather than its total abridgment. The question raised by the forfeiture statutes is not whether exercise of the right to counsel of choice can be regulated, such as by restrictions on the choice of a counsel who is otherwise occupied in order to prevent undue delay, or on the choice of attorneys disqualified by factors such as the conflict of interest in Wheat. Rather, it is whether the right may be totally destroyed by governmental action that renders the defendant completely unable to choose any private counsel. The balance struck in Wheat between the need to preserve the appearance of fairness in the criminal process and to ensure that trials

are conducted within the ethical standards of the profession, on the one hand, and the defendant's interest in choosing a particular counsel, on the other, 108 S. Ct. at 1697-98, concededly comes at the expense of values underlying the right to counsel of choice. But the effect on these values resulting from requiring the defendant to appear through his second choice of attorneys rather than his first must be regarded as marginal. There is a vast difference, however, between overriding a defendant's choice of a particular lawyer and preventing him from employing any lawyer at all. The latter would subvert many important values underlying the Sixth Amendment--diminishing the potential for trust and confidence that are essential to a meaningful attorney-client relationship, depreciating respect for individual choice and autonomy that serve as a basic premise of the right, undermining the defendant's

sense of participation in the proceeding, thereby diminishing its appearance of fairness and his ability to accept its outcome, prohibiting the exercise of free expression through private advocates, and ultimately jeopardizing public confidence in the administration of justice. As a result, the balancing approach employed in Wheat for measuring the effect of the minor regulation on the exercise of the Sixth Amendment right should be rejected here in favor of the more stringent scrutiny of Faretta.

A number of other Supreme Court cases apply the approach taken in Faretta to resolve conflicts between various significant governmental interests and the Sixth Amendment. These cases come out in favor of the Sixth Amendment. In Massiah v. United States, 377 U.S. 201 (1964), United States v. Henry, 447 U.S. 264 (1980), and Maine v. Moulton, 474 U.S. 159 (1985), the

Court found the Sixth Amendment violated when, after adversary proceedings had begun, the state used an undercover agent or informant to obtain inculpatory statements in the absence of counsel. Even though the prosecution had urged that the gathering of such evidence was necessitated by the police "interest in the thorough investigation" of both indicted crimes as well as new ones, Moulton, 474 U.S. at 179, the Court rejected this plainly significant interest, holding that "the Government's investigative powers are limited by the Sixth Amendment rights of the accused." Id. In other words, so strong is the Sixth Amendment that a routine and valuable investigative technique just could not be employed during that crucial period during which a citizen is guaranteed the assistance of counsel.

Geders v. United States, 425 U.S. 80 (1976), also supports application of

strict scrutiny to the abridgment of the right to counsel of choice. In Geders, the prosecution's concededly important interest in preventing the "improper influence on testimony or 'coaching' of a witness," id. at 89, and the needs of the proper administration of justice to allow the trial judge to exercise "substantial control over the proceedings," id. at 87, could not outweigh the defendant's right to consult counsel during an overnight recess in the trial. The conflict between these significant governmental interests and the right to counsel of the defendant "must, under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel." Id. at 91. See also Brooks v. Tennessee, 406 U.S. 605 (1972). Because the Court found that "[t]here are other ways to deal with the problem of possible improper influence on testimony or 'coaching' of a witness short of" the practice

followed, id. at 89, that practice violated the Sixth Amendment.

Here we have not merely the 17-hour "barrier between client and counsel" involved in Geders, 425 U.S. at 89, but a total barrier between the defendant and his counsel of choice. Unless that total barrier can be justified by the most compelling of governmental ends and the absence of alternative means of achieving them, this total abridgment of the right to counsel of choice may not be sanctioned.

Strict scrutiny here is also demanded by First Amendment principles, which in the context of the right to use counsel to assert legal rights overlap with those of the Sixth Amendment. Use of the forfeiture statutes to disqualify a defendant's chosen counsel and render unavailable all but public defenders picked and paid for by the Sovereign destroys important First as well

as Sixth Amendment rights, and must meet the "exacting scrutiny" traditionally applied in the First Amendment area. E.g., First Nat'l Bank v. Bellotti, 435 U.S. 765, 786 (1978); Elrod v. Burns, 427 U.S. 347, 362 (1976). Moreover, the total abridgment of the right to counsel of choice accomplished by an order restraining the defendant's use of his assets to hire any attorney is a form of prior restraint, and as such bears "a 'heavy presumption' against its constitutional validity." Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

D. The Governmental Interests Underlying the Forfeiture Statutes Do Not Justify Deprivation of the Right to Counsel of Choice Through Forfeiture of Legitimate Attorneys' Fees

These Sixth Amendment cases (Faretta, Massiah, Henry, Moulton, and Geders) and the First Amendment cases support the view

that the burden of justification required for this total abridgment of the right to counsel of choice should be framed in terms of the usual test of "strict scrutiny" invoked when fundamental constitutional rights are violated, requiring a "compelling governmental interest" and the use of "least restrictive means." See, e.g., Elrod v. Burns, supra (First Amendment right to freedom of expression); Wisconsin v. Yoder, supra (First Amendment right to free exercise of religion); Roe v. Wade, 410 U.S. 113 (1973) (substantive due process right to abortion). But whether the right is viewed as one requiring strict scrutiny or as a right to be free of "unnecessary or arbitrary" interference in the selection of retained counsel, as several of the circuit courts have stated, see, e.g., In re Grand Jury Subpoena Served on John Doe, Esq. (Slotnick), 781 F.2d 238, 250 (2d Cir. 1985) (en banc), cert. denied,

475 U.S. 1108 (1986), the standard cannot be met here.

The cases dealing with the right to counsel of choice usually involve questions of continuances to enable the defendant to retain counsel or to substitute new counsel, or to allow his chosen counsel to be available, or judicial attempts to restrict the defendant's choice of counsel because chosen counsel labors under a conflict of interest or is not a member of the bar of the court. See Wheat, 108 S. Ct. at 1697-99; Morris v. Slappy, 461 U.S. 1, 11-12 (1984); Leis v. Flynt, 439 U.S. 438 (1979). In re Grand Jury Subpoena Served on John Doe, Esq. (Slotnick), 781 F.2d 238, 250-51 (2d Cir. 1985), cert. denied, 475 U.S. 1108 (1986) (citing cases). These involve regulations on exercise of the right, not its total abridgment. Yet even in these contexts the circuit courts have protected the right to counsel of choice from any

"unnecessary or arbitrary" interference, holding that it will give way only when required by the "fair and proper administration of justice." See, e.g., Slotnick, supra, at 250 (quoting United States v. Ostrer, 597 F.2d 337, 341 (2d Cir. 1979)); United States v. Panzardi Alvarez, 816 F.2d 813, 817 (1st Cir. 1987) (the right "cannot be denied without a showing that the exercise of that right would interfere with the fair, orderly and expeditious administration of justice"); United States v. Rankin, 779 F.2d 956, 958 (3d Cir. 1986) (the right "may not be hindered unnecessarily"); United States v. Lewis, 759 F.2d 1316, 1326 (8th Cir.) ("in general, defendants are free to employ counsel of their own choice and the courts are afforded little leeway in interfering with that choice."), cert. denied, 479 U.S. 994 (1985); Linton v. Perini, 656 F.2d 207, 211 (6th Cir. 1981) (defendant may not be denied the right

"arbitrarily and without adequate reason"), cert. denied, 454 U.S. 1162 (1982); United States v. Laura, 607 F.2d 52, 56 (3d Cir. 1979) (the "arbitrary dismissal of a defendant's attorney of choice violates a defendant's right to counsel").

Unlike these trial-related instances of balancing the defendant's right to counsel of choice against the demands of the efficient administration of justice, our cases involve governmental action to strip a defendant of all his assets, thereby totally precluding his ability to retain any counsel. If anything, therefore, a higher level of scrutiny should be applied. Plainly, if Congress were to pass a statute depriving all RICO or drug felony defendants of the right to counsel of choice, that statute would be subjected to strict scrutiny and found unconstitutional. Can the same result be achieved by indirection?

The Government's interests underlying the forfeiture statutes do not justify deprivation of counsel of choice. The opening briefs of the parties and other amici curiae correctly identify these interests. Foremost is prevention of "sham" or "fraudulent" transactions improperly transferring assets to "nominees" not operating at "arms' length" with the defendant, in order to evade forfeiture. Ultimately, if the defendant is found guilty, the statutes serve to punish and deter by stripping the defendant of any ill-gotten gains and removing any illicit resources from future use in crime. All of these interests are, as a practical matter, accommodated when the accused must part with his assets to pay legitimate attorneys' fees to defense counsel.

Thus, marginal at best is the Government's legitimate interest in using the forfeiture statutes to freeze or seize

assets which the accused needs in order to defend against the forfeiture charges. But the cost is exorbitant, for it forfeits the rights of the innocent and the guilty alike in order to make sure that the guilty one does not enjoy the small pleasure of having his or her own chosen counsel during the travail. Moreover, the prosecution's deployment of the forfeiture statutes to preclude hiring private counsel tramples upon a host of other values that are fundamental to our Country. Forfeiture of legitimate attorneys' fees is thus an arbitrary and unreasonable intrusion on the defendant's right to counsel of choice and should be held unconstitutional.

On any fair balance, the right to counsel of choice powerfully outweighs the need to prevent the accused from enjoying that right. In final analysis the Government would sacrifice our very history and traditions in order to put a few more

dollars into the federal treasury, like Esau trading his birthright to Jacob for a mess of pottage. See Genesis 25: 29-34.

II. THE FORFEITURE STATUTES DO NOT COVER LEGITIMATE ATTORNEYS' FEES AND SHOULD NOT BE CONSTRUED TO DO SO; IN THE ALTERNATIVE, THE BROAD ASSERTION OF PROSECUTORIAL POWER TO IMPEDE THE ATTORNEY-CLIENT RELATIONSHIP AND IMPAIR THE ADVERSARY SYSTEM THROUGH UNFETTERED DISCRETION TO INVOKE THE FORFEITURE PROVISIONS AGAINST ATTORNEYS' FEES SHOULD BE DEEMED ULTRA VIRES

A. The Statutes Should Be Construed Not to Cover Legitimate Attorneys' Fees

As we have contended in Point I, application of the forfeiture statute to legitimate attorneys' fees violates the Sixth Amendment right to counsel of choice. At the very least, such application raises an extremely serious constitutional question. Need this difficult constitutional question be resolved by this Court?

It is a cardinal principle of statutory construction that, where possible, statutes should be construed to avoid an unconstitutional interpretation. See, e.g., Lowe v. S.E.C., 472 U.S. 181, 190 (1985); Gutknecht v. United States, 396 U.S. 295 (1970); Machinists v. Street, 367 U.S. 740, 749-50 (1961); Ashwander v. T.V.A., 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). Indeed, the Court has on occasion invoked canon of this statutory construction with special force where the application of the statute in question would raise "serious constitutional problems." DeBartolo Corp. v. Florida Gulf Coast Constr. Trades Council, 108 S. Ct. 1392, 1397 (1988); N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979).

The Court's approach in one such case, N.L.R.B. v. Catholic Bishop of Chicago, is highly instructive. The issue in Catholic

Bishop concerned whether the jurisdiction of the National Labor Relations Act extended to teachers in church-operated schools who taught both religious and secular subjects. The statutory definition of "employer" was exceedingly broad, covering "any person acting as an agent of an employer, directly or indirectly," with eight specified exceptions that did not include church-related organizations of any kind. 29 U.S.C. § 152(2); see 440 U.S. at 511 (dissenting opinion of Brennan, J., joined by White, Marshall & Blackmun, J.J.). The Court had previously read the statute as evincing Congress' intent to "vest in the [National Labor Relations] Board the fullest jurisdictional breadth statutorily permissible under the Commerce Clause," N.L.R.B. v. Reliance Fuel Oil Corp., 371 U.S. 224, 226 (1963) (emphasis in original), holding employers within the reach of Congress' interstate commerce

power to be covered regardless of the nature of their activity. The Court was worried, however, that applying the statute to church-operated schools would present "a significant risk that the First Amendment [free exercise clause] will be infringed." 440 U.S. at 502; id. at 501-04.

Given this serious constitutional concern, the Court took special care to avoid the constitutional question through statutory construction. Citing Murray v. The Charming Betsy, 2 Cranch 64, 118 (1804), and paraphrasing Chief Justice Marshall, the Court noted that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." 440 U.S. at 500. When "serious constitutional questions" would be raised by application of a statute, as the Court found the First Amendment free exercise questions before it to be, the Court defined its mandate as

follows: "we must first identify 'the affirmative intentions of the Congress clearly expressed' before concluding that the Act" applies. 440 U.S. at 500. Accord, DeBartolo Corp., 108 S. Ct. at 1398 (describing the Catholic Bishop approach as the "traditional rule"). Applying this approach, the Court, although admitting that Congress used "very broad terms" in defining the Board's jurisdiction over "employers," 440 U.S. at 504, could nevertheless find "no clear expression" in either the explicit language of the statute or its legislative history "of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act." Id. Based on the language of the statute and its legislative history, the Court found that there was "nothing to indicate an affirmative intention that such schools be within the Board's jurisdiction" and "that Congress

simply gave no consideration to church-operated schools." Id. at 504-05. The Court concluded that "in the absence of a clear expression of Congressional intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." Id. at 507.

The "traditional rule followed in Catholic Bishop," see DeBartolo Corp., 108 S. Ct. at 1398, should be applied in construing the forfeiture statutes in view of the "serious constitutional questions" that their application to attorneys' fees raises under the Sixth (and First) Amendments. Applying this approach leads to a similar result as reached in Catholic Bishop. In order to avoid the serious

constitutional difficulties presented by application of the statutes to bona fide attorneys' fees, the forfeiture statutes should be read as applicable only to sham and fraudulent attorneys' fees, and not to legitimate fees that are the product of arms' length arrangements. Several district court opinions have reached this conclusion even without benefit of the Catholic Bishop approach, and we commend them to the Court. See, e.g., United States v. Truglio, 660 F. Supp. 103 (N.D. W.Va. 1987); United States v. Figueroa, 645 F. Supp. 453 (W.D. Pa. 1986); United States v. Estevez, 645 F. Supp. 869 (E.D. Wis. 1986), aff'd on other grounds sub nom. United States v. Moya-Gomez, 860 F.2d 706 (7th Cir. 1988); United States v. Ianniello, 644 F. Supp. 452 (S.D.N.Y. 1985); United States v. Bassett, 632 F. Supp. 1308 (D. Md. 1986), rev'd on this ground but aff'd on other grounds sub nom. United States v.

Harvey, 814 F.2d 905, 913-18 (4th Cir. 1987); United States v. Badalamenti, 614 F. Supp. 194 (S.D.N.Y. 1985); United States v. Rogers, 602 F. Supp. 1332 (D. Colo. 1985); see also Monsanto, 852 F.2d at 1405-11 (concurring opinion of Winters, J., joined by Meskill & Newman, J.J.). Contra United States v. Harvey, 814 F.2d 905, 913-18 (4th Cir. 1987), aff'd on this ground but rev'd on other grounds sub nom. In re Forfeiture Hearing as to Caplin & Drysdale, 837 F.2d 637, 641-43 (4th Cir. 1988) (en banc); United States v. Nichols, 841 F.2d 1485, 1491-96 (10th Cir. 1988).

The plain language of the criminal forfeiture statutes does not explicitly provide that attorneys' fees are forfeitble; it provides only for the forfeiture of "any property" obtained as a result of the crime. See 18 U.S.C. §§ 1963(a)(3); 21 U.S.C. §§ 853(a)(1).* "Property" is

*The criminal forfeiture statutes also reach

(Footnote continued on following page)

broadly defined to include "(1) real property, including things growing on, affixed to, and found in land; and (2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities." 18 U.S.C. § 1963(b); 21 U.S.C. § 853(b). While Congress thus defined the "property" subject to forfeiture in very broad terms, there is no indication in the language of the statute that attorneys' fees were deemed to be covered. Under the approach taken in Catholic Bishop, the broad statutory definition of "property" does not, without a strong manifestation of intent in the legislative history, constitute the

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"any interest the person has acquired or maintained in violation of" RICO, 18 U.S.C. § 1963(a)(1); "any . . . property" used to facilitate commission of a felony drug law violation, 21 U.S.C. § 853(a)(2); and "any . . . interest in" and "any . . . property . . . affording a source of influence over" a criminal enterprise. See 18 U.S.C. 1963(a)(2); 21 U.S.C. § 853(a)(3).

"clear expression of an affirmative intention of Congress," 440 U.S. at 504, necessary to find the statutes applicable to bona fide attorneys' fees.

The statute construed in Catholic Bishop had a very broad provision defining basic coverage and numerous special exceptions. Yet the Court, in effect, carved out another exception for teachers in church schools. The CFA of 1984 has a broad forfeiture provision reaching "any property" and exemptions for owners of superior title and bona fide purchasers. It would be perfectly proper under Catholic Bishop to carve out a further exemption for legitimate attorneys' fees in order to protect the Sixth Amendment. However, it may not be necessary to go that far because of the language employed in the existing provision setting up the exemptions. Let us explain.

B. The Statutes Expressly Direct that Purchasers Be Treated "Reasonably"

The criminal forfeiture statutes provide for a post-conviction hearing at which third parties may challenge a forfeiture judgment concerning property transferred to them, see 18 U.S.C. § 1963 (l), 21 U.S.C. § 853(n), but again do not refer to attorneys' fees. Moreover, the plain language of these provisions leaves ample room for exempting legitimate attorneys' fees from forfeiture.

The Government has insisted in fee forfeiture litigation that the plain language of the statutes covers attorneys' fees because of its general inclusiveness and because the only conceivable statutory exception to forfeiture in these cases is the provision for bona fide purchasers, 18 U.S.C. §§ 1963(c) and 1963(l)(6)(B); 21 U.S.C. §§ 853(c) and 853(n)(6)(B), which attorneys cannot meet. But the Government

overlooks key language of the statutes it relies upon.

Under the CFA a petitioner seeking to amend an order of forfeiture to exempt transferred property therefrom must establish that:

> (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

18 U.S.C. § 1963(1)(6)(B) (emphasis added); see also 21 U.S.C. § 853(n)(6)(B). Congress added the underlined language to define the bona fide purchaser ("bfp") exemption it was creating. The added language suggests that purchasers with some cause to believe the property was subject to forfeiture may nonetheless be entitled to relief from forfeiture. Moreover, careful scrutiny of the actual language chosen and comparison with the definitions

of bona fide purchaser used in other statutes reveals a fairly generous exemption.

Congress did not speak of persons who were "without reason to believe" that the property was subject to forfeiture. Compare 18 U.S.C. § 3668(b) ("that he had at no time any knowledge or reason to believe that it was being or would be used in the violation of laws"); 15 U.S.C. § 714p ("did not know or have reason to know"). It did not even speak of persons who were "without reasonable cause to believe" the property might be forfeited. Cf. 28 U.S.C. § 2465 (existence of "reasonable cause" for a seizure disentitles victorious claimant of property from award of costs, and confers immunity upon the prosecutor and upon the persons who made the seizure). Instead Congress exempted persons who were "reasonably without cause to believe" that the property might be forfeited.

Let us take a formal look at the precise wording of the statute. As a matter of grammar and logic, the word "reasonably" is unnecessary unless it ameliorates the "without cause to believe" phrase that follows it. Furthermore, the choice to locate this "reasonableness" modifier at the beginning of the phrase rather than later as a descriptor of the quantum of "cause" needed to defeat the purchaser's claim (e.g., "without cause reasonably to believe"), tells us that the modifier has a larger purpose than to serve as some standard of proof. The purpose is to introduce a rule of reason into the entire question of forfeiting the interests of those who acquire the defendant's property in good faith.

Further, as a matter of lexicology the term "reasonably" connotes: conduct bounded by reason, e.g., acting in a reasonable manner; a condition which

exists moderately; a proposition which is somewhat or fairly sufficiently true; or that which is rational and sensible, is governed by logic or justice, or is subject to a rule of reason. See II The Compact Edition of the Oxford English Dictionary 2432 (1971); Webster's Third New International Dictionary 1892 (unabridged ed. 1981); The Random House Dictionary of the English Language 1608 (2d ed. unabridged 1987); WordFinder Dictionary Thesaurus* (Model WF-220). The first definition of "reasonably" set forth in the Oxford English Dictionary is "1. According to reason, with good reason, justly, properly." Supra. All these shades of meaning carry the idea of flexibility which the Government insists is lacking from the statutory scheme.

From this perspective and as a matter

*An electronic dictionary-thesaurus compiled for Xerox Corporation and Microlytics, Inc.

of common sense, when Congress exempted persons who were "reasonably without cause to believe" that property might be forfeited it included those persons (such as defense lawyers) whose basis to believe that the property was subject to forfeiture does not amount to reasonable cause for a court to visit the hardship of forfeiture upon them. As Chief Judge Clark of the Fifth Circuit put it, "the defense attorney's necessary knowledge of the charges against his client cannot defeat his interest in receiving payment out of the defendant's forfeited assets for legitimate legal services." United States v. Thier, 801 F.2d 1463, 1474 (5th Cir. 1986), modified on other grounds, 809 F.2d 249 (5th Cir. 1987).

In short, the plain language of the statute supports our view. It is unreasonable and unjust to forfeit property needed to pay legitimate attorneys' fees merely

because of what the lawyers need to know in order to do their job properly. But, at worst, this statutory language is ambiguous* and authorizes consideration of what we believe is plain legislative history also supporting our contention.

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*We recognize that the Senate Report briefly describes the bfp exemption by paraphrasing it in more traditional syntax than the language actually employed by the Congress:

> where the petitioner acquired his legal interest after the acts giving rise to the forfeiture but did so in the context of a bona fide purchase for value and had no reason to believe that the property was subject to forfeiture.

Sen. Rep. No. 225, 98th Cong., 1st Sess. 209 (1983), 1984 U.S. Code Cong. & Admin. News 3182, 3392. This report does not elaborate what the Congress meant by its "reasonably without cause to believe" wording of the bfp provision. Moreover, the report does stress the basic purpose of the 1984 amendment to prevent sham transfers to nominees. Id. n.47. So the statutory language used remains supportive or, at least, ambiguous--and in either event fairly amenable to the interpretation we urge.

C. The Legislative History Evinces No Affirmative Intention, Clearly Expressed, to Interfere with Sixth Amendment Rights

If the forfeiture provisions are ambiguous or, at the least, lack clarity, they absolutely must be construed to avoid constitutional problems. And, in this regard, the statutes certainly cannot be said to evince "the affirmative intention of the Congress clearly expressed," Catholic Bishop, 440 U.S. at 501, that attorneys' fees were covered.

In addition, they must be viewed through the lens of the "rule of lenity". The rule of lenity is as appropriate in the forfeiture context, see United States v. One 1936 Model Ford V-8 DeLuxe Coach, 307 U.S. 219, 226 (1939) ("Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law."); United States v. $38,000.000 in U.S. Currency, 816 F.2d 1538, 1547 (11th

Cir. 1987)(same); United States v. One 1976 Ford F-150 Pick-Up Vin F144UB03797, 769 F.2d 525, 527 (8th Cir. 1985) (same), as it is in that of the criminal prohibition. See, e.g., McNally v. United States, 483 U.S. ---, 107 S.Ct. 2875, 97 L.Ed. 2d 292, 302 (1987); Bifulco v. United States, 447 U.S. 381, 387 (1980).*

Because of the lack of clarity in the statutes and the serious constitutional difficulties raised by construing them to cover legitimate attorneys' fees, it is

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*We do not believe that the liberal construction clause contained in the CFA, 21 U.S.C. § 853(o), and in the RICO law ("The provisions of this section shall be liberally construed to effectuate its remedial purposes."), see Russello v. United States, 464 U.S. 16, 27 (1983), can cure the ambiguity here. As the Eighth Circuit has found, "[t]he extent of judicial deference" owed such a clause "stands unclear" in view of the countervailing force of the constitutionally based rule of lenity. United States v. Anderson, 626 F.2d 1358, 1369-70 (8th Cir. 1980), cert. denied, 450 U.S. 912 (1981). In any case, as we have contended, the "remedial" purpose of the forfeiture provisions can be fully effectuated without construing them to apply to legitimate attorneys' fees. See United States v. Mandel, 415 F. Supp. 997, 1022 (D. Md. 1976).

appropriate to look at the legislative history to determine whether it can provide the needed "affirmative intention . . . clearly expressed." 440 U.S. at 501, 504. See also 2A Sutherland, Statutory Construction § 48.01 (4th ed. 1973); Russello v. United States, 464 U.S. 16, 20 (1983) (a "clearly expressed legislative intent to the contrary" may justify disregarding even unambiguous statutory language); United States v. American Trucking Ass'ns, 310 U.S. 537, 540 (1940) (when plain meaning of a statute has lead to "absurd or futile results" or to "an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words.").

Congress, in enacting CFA, intended to close a loophole in the previous criminal forfeiture scheme that had allowed defendants to evade forfeiture by means of

third-party transfers prior to conviction. See S. Rep., No. 225, 98th Cong., 1st Sess. 200-01 (1983), 1984 U.S. Code Cong. & Admin. News at 3182, 3383-84. The district court opinions construing the statute not to reach legitimate attorneys' fees concluded that Congress only intended the forfeiture provisions to reach fraudulent third-party transfers, such as "sham" attorneys' fees. See cases cited, supra. The legislative history demonstrates that Congress did not contemplate the application of the statute to legitimate as opposed to fraudulent attorneys' fees. A footnote in a House Report accompanying an earlier draft of the 1984 amendments states that "[n]othing in this section is intended to interfere with a person's Sixth Amendment right to counsel." H.R. Rep. No. 845, Part I, 98th Cong., 2d Sess. 19 n.1 (1984). This footnote, in its next sentence, states that "[t]he Committee,

therefore, does not resolve the conflict in District Court opinions on the use of restraining orders that impinge on a person's right to retain counsel in a criminal case." Id. Although some courts have construed this sentence to mean that Congress "simply left the question for the courts," United States v. Nichols, 841 F.2d 1485, 1496 (10th Cir. 1988), a proper reading of the two sentences, in sequence, demonstrates that Congress did not contemplate application of the forfeiture statute to legitimate attorneys' fees. In view of the clear disclaimer in the first sentence that the statute not be read "to interfere with a person's Sixth Amendment right to counsel," it would be unnecessary to resolve the conflict in the district courts concerning the constitutionality of the statute because Congress did not contemplate that the statute would be applied in this way, i.e., Congress expected the

statute to be applied only to sham fees. To apply it to legitimate fees would at least potentially interfere with the right of counsel, which Congress stated it did not intend to do. The use of the word "therefore" in the second sentence makes it plain that Congress was not merely announcing that it was leaving the constitutional question to the courts. The word "therefore" refers back to the first sentence and links Congress' statement that it would not resolve the question with its earlier expressed intent not to interfere with Sixth Amendment rights. Because of this expressed intention it "therefore" would be unnecessary to resolve the question.

The Senate report, in discussing the bona fide purchaser exception to forfeiture, states that "[t]he provision is to be construed to deny relief to third parties acting as nominees of the defendant

or who have knowingly engaged in sham or fraudulent transactions." S. Rep., supra, at 209 n.47, 1984 U.S. Code Cong. & Admin. News at 3392 n.47. The same Senate Report states that "[t]he purpose of this provision is to permit the voiding of certain pre-conviction transfers and so close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not 'arms' length' transactions." S. Rep., supra, at 200-01, 1984 U.S. Code Cong. & Admin. News at 3384. A Senate report declaring the "purpose" of a legislative provision and directing how it "is to be construed" should not casually be interpreted to authorize greater mischief than required by the purpose. This is even truer when the House report declares what is not "intended"--interference with Sixth Amendment rights. Hence, the legislative history plainly supports our view.

In any event, the legislative history fails to demonstrate a "clear expression of an affirmative intention of Congress," Catholic Bishop, 440 U.S. at 504, to subject bona fide attorneys' fees to forfeiture. The fairest conclusion may be "that Congress simply gave no consideration," id., to the application of these provisions to legitimate as opposed to sham attorneys' fees,* and certainly had no intention of interfering with defendants' Sixth Amendment rights. Indeed, this was conceded even by the Tenth Circuit Court of Appeals in its opinion in Nichols, 841

*Although the Senate Report cited with approval a pre-1984 amendment case holding that some of a defendant's property was forfeitable even though it was transferred to his attorney prior to conviction, S. Rep., supra, at 200 n.28, 1984 U.S. Code Cong. & Admin. News at 3383 n.28 (citing United States v. Long, 654 F.2d 911 (3d Cir. 1981)), "the facts in this case suggest that the transfer was part of a sham." Note, Attorneys' Fee Forfeiture Under the Comprehensive Forfeiture Act of 1984: Can We Protect Against Sham Transfers to Attorneys, 62 Notre Dame L. Rev. 734, 741 n.72 (1987).

F.2d at 1496 n.6, which rejected the contention that the statutes should be construed not to cover legitimate attorneys' fees. After an independent "review" of the hearings and the rest of the legislative history, the court could find "only a few oblique references to payments of attorneys," and concluded that "[n]one of these passages indicates that Congress specifically considered whether payments made to attorneys should be subject to forfeiture." Id.* To avoid

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*Where the majority of the panel went wrong in Nichols was in failing to recognize the natural reconciliation between the Government's interest in bringing about forfeiture and the defendant's interest in having the property go to a defense lawyer. (See Point I. D, supra.) In addition, the majority turned logic upside down when it read the Victims of Crime Act of 1984 (now codified at 18 U.S.C. § 3681) to support an inference that when Congress wanted to exempt attorneys' fees, it said so explicitly. 841 F.2d at 1496. The act demonstrates that when Congress wanted to authorize forfeiture of property that might be needed for attorneys' fees, it dealt explicitly with the problem. Moreover, the majority overlooked a critical amendment to the final law passed. The proposed bill would have allowed the regulating of crime publicizing

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the difficult Sixth Amendment problems that would otherwise result, the statute should accordingly be construed not to reach legitimate attorneys' fees, but to apply only to those that are sham or fraudulent transfers.

D. The Government's Broad Assertion of Unfettered Prosecutorial Discretion to Interfere with the Attorney-Client Relationship, Impinge on the Right to Counsel of Choice, and Impair the Adversary System Should Be Rejected as Ultra Vires the Statute

Whatever can be said about the language and the legislative history of the 1984 amendments, it is "clear that Congress

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profits to apply "at any stage of the criminal proceedings" 130 Cong. Rec. S10,542 (daily ed. Aug. 10, 1984). The statute as passed two months and two days later applied only "after conviction," 18 U.S.C. § 3681(a); see id., § 3681(c)(1)(B)(ii)--thus manifesting a clear Congressional intent to avoid interfering with Sixth Amendment rights.

did not consider the potential impact that the new forfeiture provisions would have upon attorneys . . . ." Committee on Criminal Advocacy, The Forfeiture of Attorneys' Fees in Criminal Cases: A Call for Immediate Remedial Action, 41 The Record of the Association of the Bar of the City of New York 469, 477 (1986). Plainly, there is no indication that Congress in any way intended to cede to the prosecutor the extraordinary authority to eliminate chosen defense counsel and profoundly alter the adversary system by the simple expedient of adding forfeiture claims to its prosecutorial assault.

Forfeiture of attorneys' fees represents a grave threat to our adversary system of justice. Cloud, Forfeiting Defense Attorneys' Fees: Applying an Institutional Role Theory to Define Individual Constitutional Rights, 1987 Wis. L. Rev., 1, 56; Note, Against Forfeiture of

Attorneys' Fees Under RICO: Protecting the Constitutional Right of Criminal Defendants, 61 N.Y.U. L. Rev. 124 (1986). The unfettered discretion asserted for prosecutors under the Government's interpretation of the statute creates a serious potential for prosecutorial abuse:

> Because almost any indictment that charges felony violation of federal law can be transformed into a RICO indictment, the government can gain the "ultimate tactical advantage of being able to exclude competent defense counsel as it chooses merely by appending a forfeiture indictment." The defendant who had already retained counsel would risk losing her upon disclosure that the prosecution intended to seek forfeiture of attorneys' fees; if the defendant had yet to retain counsel, the prosecutor would have the tools to make it extremely difficult for him to do so. In short, the government would have the power both to prevent a particular attorney from representing a given defendant, and to prevent a defendant from retaining any private counsel at all . . . .

Note, 61 N.Y.U. L. Rev., supra, at 147-48 (footnotes omitted). See also Note,

Forfeiture of Attorneys' Fees: Should Defendants Be Allowed to Retain the "Rolls Royce of Attorneys" with the "Fruits of the Crime"?, 39 Stan. L. Rev. 663 (1987); Committee on Criminal Advocacy, supra, at 484 ("if the government wishes to exclude a lawyer from a particular case, it need only allege a RICO violation, add a forfeiture section to the indictment, and then inform the defendant's lawyer that it will seek forfeiture of his legal fees in the event of a conviction. Such unfettered power would strike at the heart of the adversary system."); Thier, 801 F.2d at 1476 (Rubin, J., concurring) ("The tool of the restraining order, thus put into the hands of the prosecution, gives the Government power to exclude vigorous and specialized defense counsel.").

Under the construction of the forfeiture statute urged by the Government, the prosecutor would enjoy awesome power to

affect the balance between the accused and the Sovereign in the criminal process. See Wardius v. Oregon, 412 U.S. 470, 474 (1973) (due process requires "balance of forces between the accused and his accuser"); Cloud, 1987 Wis. L. Rev., supra. The unfettered power to disqualify the defendant's selected champion and render unavailable representation by any private counsel, relegating the defendant to an attorney selected, trained, supervised, and paid for by the very government that seeks to deprive him of his liberty, cuts strongly against the grain of our adversary system and our basic concepts of fairness. To lodge such unfettered power in the hands of any governmental authority would raise troubling questions. When such wide power to tamper with the adversary process is placed in the hands of one of the adversaries in the contest--the prosecutor--the resulting potential for abuse is simply too

great. Cf. Tumey v. Ohio, 273 U.S. 510 (1927) (pecuniary interest of judge in outcome of proceedings results in per se bias reversible even without a showing that the bias affected the judge's conduct). The actual abuse is even greater, of course, when the legislation is applied across the board rather than selectively. Then it knocks retained counsel out of as many cases as possible, severely undermines the private defense bar and catastrophically overloads the public defender system.

The legislative history discussed above demonstrates that Congress never intended to arm prosecutors with such a lethal weapon.* In reality, Congress just

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*We also doubt that the bfp exemption was actually designed to protect against forfeiture of attorneys' fees, although it may have this effect. This provision purports to operate only after the trial is over. 18 U.S.C. § 1963(i); 21 U.S.C. 853(k). But payment of attorneys' fees is an exceptional kind of transfer which arises out of the necessity to defend and which must ordinarily be resolved prior to trial.

adopted some procedural reforms of forfeiture law recommended by the Department of Justice, part of the massive Comprehensive Crime Control Act of 1984, P.L. 98-473, 98 Stat. 1837, passed on October 12, 1984, and adjourned for the fall elections. Subsequent legislative history also demonstrates that Congress did not intend to authorize the Department of Justice to interfere with Sixth Amendment rights. See Brief for Respondent (Peter Monsanto) in Case No. 88-454; Brief Amicus Curiae of the American Bar Association in Support of the Peitioner Caplin & Drysdale in No. 87-1729 and the Respondent Monsanto in No. 88-454, at p. 10. Thus, we must ask whether this general legislative language can support such a broad assertion of prosecutorial discretion, impinging so heavily on individual liberties and altering so dramatically the nature of our adversary system?

Substantial precedent prohibits

reading general statutory language as delegating dangerous power to infringe upon fundamental rights. Courts have demanded an explicit legislative expression of the intention to delegate such authority. E.g., Thompson v. Oklahoma, 487 U.S. ---, ---, 108 S. Ct. 2687, 2706, 101 L.Ed. 2d 702, 728 (1988) (O'Connor, J., concurring); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 308-09 (1973) (opinion of Powell, J.); Hampton v. Mow Sun Wong, 426 U.S. 88, 105-14 (1976); Greene v. McElroy, 360 U.S. 474, 507 (1959); Kent v. Dulles, 357 U.S. 116, 129 (1958); see J. Freedman, Crisis and Legitimacy 83-85 (1978); B. Schwartz, Administrative Law 47-48 (1976); L. Tribe, American Constitutional Law § 517, at 365-66 (2d ed. 1988); A. Bickel, The Least Dangerous Branch 111-98 (1962); Tribe, The Emerging Reconnection of Individual Rights and Institutional Design: Federalism, Bureaucracy, and Due Process of

Lawmaking, 10 Creighton L. Rev. 433, 442-43 (1977).

The Brief for the Respondent (Monsanto) in Case No. 88-454 discusses a leading case, Kent v. Dulles, and we agree that the decision there provides a good analogy here. We also agree that the Fourth Circuit majority below in Case No. 87-1729, In re Forfeiture Hearing as to Caplin & Drysdale, 837 F.2d 637, 648-49 (4th Cir. 1988) (en banc), simply overlooked that the serious problems it saw in the CFA should be solved by holding the application of that legislation to legitimate attorneys' fees to be ultra vires. Then Congress would have the opportunity in the first instance to resolve the profound questions of public policy raised by the Executive Branch's assumption of the authority at issue in these cases. A judicial "remand" to the legislature may be the answer.*

*We, as amici curiae, also share the view

(Footnote continued on following page)

CONCLUSION

Let us conclude this long brief in short epilogue.

We, the People, cherish the right to counsel and the primary right to choose our own counsel. We disfavor, even eschew, forfeitures. The latter is now encroaching on the former. If the Government's blind expansion of a legal fiction is not stopped, the result will be to take the adversary out of the adversary process. The Sixth Amendment is at stake.

We ask this Court to hold strong for

(Footnote continued from preceding page)

that the problems cannot be solved by devising some sort of preliminary mini-trial to determine, for practical purposes, the issues which are only supposed to be decided after a full Sixth Amendment jury trial. See Brief of the Committees on Criminal Advocacy, and Criminal Law of the Association of the Bar of the City of New York, et al. as Amici Curiae in Support of Respondent (Monsanto), in Case No. 88-454, at pp. 22-23. See also United States v. Monsanto, 836 F.2d 74, 86-87 (2d Cir. 1987) (Oakes, J., dissenting), rev'd, 852 F.2d 1400 (2d Cir. 1988) (en banc). Indeed, we see these cases as governed by substantive Sixth Amendment protection of the right to counsel of choice, for which there is no procedural due process "fix."

Freedom, and affirm the Monsanto court below in its holding that genuine attorneys' fees are exempt from forfeiture under the CFA. And, the Court should reverse the en banc decision in Caplin & Drysdale and reinstate the district court decision allowing reasonable attorneys' fees for legitimate legal services rendered.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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No. 88-454
No. 87-1729

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

UNITED STATES OF AMERICA, Petitioner,

v.

PETER MONSANTO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CAPLIN & DRYSDALE, CHARTERED, Petitioner,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF THE UNITED STATES OF AMERICA

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QUESTION PRESENTED

Does the Due Process Clause of the Fifth Amendment or the right to counsel guaranteed by the Sixth Amendment to the United States Constitution require that property restrained and alleged to be subject to forfeiture be made available to a criminal defendant to employ counsel of choice?

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INTEREST OF AMICUS CURIAE

With the Comprehensive Crime Control Act of 1984 (Pub.L.No.98-473, 98 Stat. 2040 (1984)), Congress acknowledged state and local law enforcement as full-fledged and vital partners in the national struggle against the scourge of narcotics trafficking. In that act Congress authorized the Attorney General and Commissioner of Customs to transfer to a state or local law enforcement agency forfeited property or the proceeds of a successful forfeiture proceeding in an amount proportionate to the agency's effort leading to the seizure of the asset. (Ch. III, Comprehensive Crime Control Act of 1984, amending 21 U.S.C. § 881(e) and 19 U.S.C. § 1616.) Congress renewed this warrant in 1986 (Tit. I, subtit. D, § 1992 Anti-Drug Abuse Act of 1986, amending 21 U.S.C. § 881(e) and 19 U.S.C. § 1616a), and most recently reaffirmed the importance of these "equitable transfers" in the

Anti-Drug Abuse Act of 1988 (Tit. VI, subtit. B, § 6077, amending 21 U.S.C. § 881(e)).

A state or local agency becomes eligible for an "equitable transfer" of federally forfeited property or proceeds when, acting alone, it makes a seizure which is "adopted" by a federal law enforcement agency (see, United States v. One Ford Coupe Automobile, 272 U.S. 321, 325 (1926)) and subjected to federal forfeiture proceedings (see generally, 19 U.S.C. § 1604 et seq.). Alternatively, a state or local agency may "share" the proceeds of a forfeiture action so as to reflect its contribution when it is involved cooperatively in an investigation with a federal law enforcement agency leading to the seizure and forfeiture of property under federal law. (See, the Attorney General's Guidelines on Seized and Forfeited Property, Federal Register,

Vol. 52, No. 237, Thursday, December 10, 1987, pp. 46855-46862.)

Over the past four years, state and local law enforcement agencies nationally have seized or participated in the seizure of hundreds of millions of dollars of narcotics related assets which have been subjected to federal "administrative" (19 U.S.C. § 1607) and judicial (19 U.S.C. § 1610) forfeiture proceedings (see, United States v. U.S. Currency in Amount of $2,857.00, 754 F.2d 208 (7th Cir. 1985). This month the Los Angeles Police Department reached the one hundred million dollar ($100,000,000.00) mark in drug-related seizures measured from 1985. In this period of time property and proceeds worth some two hundred million dollars ($200,000,000.00) have been transferred (back) to state and local law enforcement agencies as equitable shares of completed

forfeiture actions -- twenty-four million dollars ($24,000,000.00) in FY 1986, sixty-seven million dollars ($67,000,000.00) in FY 1987, and one hundred four million ($104,000,000.00) in FY 1988. (Statistics provided by the Drug Enforcement Administration and Federal Bureau of Investigation and do not include equitable transfers from Treasury Department agencies, in particular, the United States Customs Service.)

These seizures, successful forfeiture actions and "equitable transfers" have a double-barreled impact. First, seizure and forfeiture of narcotics related assets strip drug traffickers of their economic base. (In re Forfeiture Hearing as to Caplin & Drysdale, Chartered, 837 F.2d 637, 648 (4th Cir. 1988) (en banc), cert. granted, [hereafter cited as Caplin & Drysdale, Chartered]). Second, every dollar equitably transferred to a

state or local agency is, in keeping with the Attorney General's Guidelines, allocated exclusively for law enforcement purposes so as to increase the law enforcement resources of the agency. Thus, drug related property, either in kind or in specie, is taken from and turned against drug dealers.

California law enforcement agencies have aggressively pursued the seizure and forfeiture of narcotics related assets both in cooperation with federal agencies and in their own investigations. Nearly forty percent (40%) of equitable transfer claims received by federal agencies nationally have been submitted by California law enforcement. To date California agencies have received approximately sixty million dollars ($60,000,000.00) in equitable transfers and millions more are in process pending forfeiture.

Indeed, the utilization of these procedures has been so vigorous that the federal law enforcement agencies and United States Attorneys in California have been hard pressed to keep pace with the seizures made by state and local agencies. This has resulted in the imposition of minimum value limits by the federal offices as a condition to the acceptance of state and local initiated seizures. Moreover, the Anti-Drug Abuse Act of 1988 amends 21 U.S.C. section 881(e) in a manner which seems to reflect Congress's determination that the states should enact and employ their own forfeiture laws. (An "equitable transfer" will be barred when it would "circumvent any requirement of State law that prohibits forfeiture or limits use or disposition of property forfeited". [Tit. VI, subtit. B, § 6077].)

Recognizing the need for an effective state forfeiture mechanism, the

California Legislature modernized the State's narcotics related forfeiture statutes in 1982 and made major revisions in 1986 and again in 1988 in an effort to make these provisions as useful and effective as federal forfeiture law. (Cal. Health & Saf. Code § 11470 et seq.; Stats. 1982, ch. 1289; Stats. 1986, chs. 1032, 1044; Stats. 1988, ch. 1492.) As a result, California now has a civil, in rem narcotics related forfeiture law comparable in most particulars to section 881 of Title 21. These statutes return ninety percent (90%) of forfeited property directly to the seizing agency and prosecutors. (Cal. Health & Saf. Code § 11489.) (Nearly every state has some form of narcotics related forfeiture statute. Thirty states have enacted a version of section 505 of the 1970 Uniform Controlled Substances Act (9 Uniform Laws Annotated 187, 611-614), a civil, in rem forfeiture statute modeled on

section 881.) (Id. at pp. 187-194, id. at p. 78 (Cum.Sup. 1983).)

The ever increasing resort to asset seizure and forfeiture by law enforcement in California, the consequent burden on federal agencies, and the improvements in the State's statutes have prompted greater reliance on state forfeiture proceedings. This is a trend we expect will continue here and spread to other states.

California, therefore, has a compelling interest in the effective implementation of both federal and its own forfeiture procedures. We believe the fate of both are at stake in these cases. If a defendant has a right to use property subject to forfeiture to pay counsel, the state will be deprived of much of the property seized by its law enforcement agencies which is used to further enhance anti-drug trafficking efforts. At the same

time, the narcotics offender will be able to command high priced legal talent from his criminally acquired or tainted property.

The forfeiture allegations in the indictment underlying the Caplin & Drysdale, Chartered matter, directed against nearly all property interests of the defendant, represent the ultimate reach of existing forfeiture laws. However, that case is not particularly representative. In the vast majority of situations property seized or restrained and otherwise alleged to be subject to forfeiture is composed of discreet, readily identifiable assets which generally have an immediate and obvious connection to illegal activity as proceeds of or property used to facilitate violations of the narcotics laws. The property at stake in Monsanto is closer to the norm. (United States v. Monsanto, 852 F.2d 1400, 1401 (2d Cir.

1988), (en banc), cert. granted.) Moreover, with rare exceptions, seizures under California's in rem forfeiture provisions involve assets worth less than one hundred thousand dollars ($100,000.00).

Invariably, it is these seized assets which are looked upon by the criminal defendant as the preferred and primary source of paying counsel. The reasons are rather obvious.

First, the desire for private counsel and the expense attended thereto can be satisfied with property which would otherwise, in all likelihood, be lost to the government. Second, whether or not the defendant has other assets, property which has been identified by the government, seized or otherwise restrained, and alleged to be subject to forfeiture is in most instances the most readily available asset with which to compensate counsel. Finally, given the nature of the narcotics

trade, whether the individual is a narcotics kingpin like Christopher Reckmeyer or a mere courier or "mule", the assets which are subject to forfeiture are normally the only property "available" to the defendant. (See, e.g., United States v. Lewis, 759 F.2d 1316, 1326 (8th Cir. 1985).) In fact, in countless instances property seized and alleged to be subject to forfeiture may not belong to the defendant at all; it is the property of the narcotics enterprise. (See, e.g., United States v. Moya-Gomez, 860 F.2d 706, 714-715 (7th Cir. 1988).) Nevertheless, that defendant's superior in the narcotics trafficking organization, the nominal "owner" of the property, would much prefer to see the asset used to pay counsel to defend his subordinate and ensure that person's loyalty and silence than to see it forfeited to the government.

Nearly without fail, it is claimed that the very property seized and subjected to forfeiture proceedings is that "needed to pay counsel." We encountered a systematic practice in California in which seized assets were routinely assigned to counsel to pay legal fees. (See, Franchise Tax Board v. Superior Court (McKean), 168 Cal.App.3d 970, 975, 215 Cal. Rptr. 36, 38 (1985) [such an assignment is "presumptively fraudulent"]; see also, United States v. Thirteen Thousand Dollars in U.S. Currency, 733 F.2d 581 (8th Cir. 1984); United States v. $364,960.00 in U.S. Currency, 661 F.2d 319 (5th Cir. 1981); United States v. $22,640 in U.S. Currency, 615 F.2d 356 (5th Cir. 1980); United States v. Currency Totaling $48,318.08, 609 F.2d 210 (5th Cir. 1980) United States v. Marshall, 526 F.2d 1349 (9th Cir. 1975).) The defense attorney would then seek to enforce this assignment in the criminal

proceeding by obtaining an order to return the property premised upon the defendant's asserted Sixth Amendment right to counsel of choice. When enforced these assignments all but eliminated the "res" in the forfeiture action. However, this practice was largely checked when the California Court of Appeal decided the case of People v. Superior Court (Clements), 200 Cal.App.3d 491, 246 Cal.Rptr. 122 (1988), hearing denied, Cal. Supreme Court, July 28, 1988, No. S005855.

(Clements) arose as a consolidated writ proceeding from four separate criminal prosecutions in which the judge who was presiding over the preliminary hearing of the defendant ordered the police to return seized funds ranging in an amount from approximately eighty thousand dollars ($80,000.00) to fifteen hundred dollars ($1,500.00)to the defendant to pay counsel. (In two of the

underlying proceedings, the court took no evidence on the issue of the reasonableness of the purported assignment of the seized assets to pay attorney's fees, the lack of other resources available to the defendant to employ counsel or the availability of other counsel. These two cases involved seized assets assigned in whole to defense counsel in amounts of forty-eight thousand nine hundred seventy-six dollars ($48,976.00) and seven thousand nine hundred dollars ($7,900.00), respectively. In the other two cases the court conducted an in camera hearing from which the prosecutor was excluded wherein the court purportedly entertained representations concerning the reasonableness of the assignment to pay counsel fees. The assignments in these two cases were for approximately one thousand dollars ($1,000.00) and eighty thousand dollars ($80,000.00), respectively.)

Relying principally upon the decision of the Fourth Circuit in Caplin & Drysdale, Chartered, the California Court of Appeal held that there was nothing in the California narcotics asset forfeiture provisions (Cal. Health & Saf. Code § 11470 et seq.), patterned as they are after the federal statutes, which exempted from forfeiture property necessary for bona fide attorney's fees. (People v. Superior Court (Clements), supra, 200 Cal.App.3d at pp. 497-498, 246 Cal.Rptr. at pp. 125-126.) The Court further held that the government's interest in the forfeiture of narcotics related property outweighed any Sixth Amendment right to use this property to secure counsel. (Id., 200 Cal.App.3d at pp. 498-501, 246 Cal.Rptr. at pp. 126-128.) Although not an issue in the (Clements) decision, the Court acknowledged the importance of the availability of a probable cause hearing when a claim is made

that seized or restrained assets are needed to pay counsel. (Id. 200 Cal.App.3d at p. 495, 246 Cal.Rptr. at p. 124) California law specifically provides for such a hearing. (See, Cal. Health & Saf. Code § 11488.4(g), formerly § 11488.4(h).)

Amicus curiae believes the (Clements) case was correctly decided as was Caplin & Drysdale, Chartered upon which it was based. We urge this Court to ratify these decisions as we anticipate that any ruling in these cases premised on constitutional grounds will necessarily affect proceedings under California law, as well as the federal forfeiture statutes.

Although some courts have suggested that for purposes of the Sixth Amendment attorney fee claim, there is a distinction between an in rem forfeiture action and in personam, criminal forfeiture (see, United States v. Bailey, 666 F.Supp. 1275 (E.D.Ark. 1987)), amicus curiae does

not believe that such a facile distinction would survive careful scrutiny. (See, United States v. U.S. Coin and Currency, 401 U.S. 715, 718 (1971).) Indeed, a number of courts have squarely addressed the Sixth Amendment right to counsel of choice claim in the context of an in rem forfeiture action. (See, United States v. Unit Number 7 and Unit Number 8, 853 F.2d 1445 (8th Cir. 1988); United States v. $70,476 Dollars in U.S. Currency, 677 F.Supp. 639 (N.D.Cal. 1987), appeal dismissed, 845 F.2d 329 (9th Cir. 1988); United States v. One Parcel of Land, 614 F.Supp. 183 (N.D.Ill. 1985).)

Likewise, there appears to be no reasoned basis for distinguishing between a case in which the government alleges that all or nearly all of a defendant's estate is subject to forfeiture (Caplin & Drysdale, Chartered) and that in which only particular items of property are cited

(Monsanto). If the defendant claims the asset is needed to pay counsel, and the Sixth Amendment requires that this claim be addressed, at minimum the court, prosecutor and defense will be drawn into a murky, subordinate controversy over whether the fee is reasonable (a highly subjective determination) and whether the defendant has other legitimate assets to pay counsel (a question particularly within the defendant's knowledge and concerning which the defendant can hardly be expected to be forthcoming). (See, United States v. Jones, 837 F.2d 1332, 1335 (5th Cir. 1988), petition for rehearing en banc granted; United States v. $70,746 Dollars in U.S. Currency, supra, 677 F.Supp. at 646; United States v. Nichols, 654 F.Supp. 1541, 1559 (D.Utah 1987) reversed, 841 F.2d 1485 (10th Cir. 1988); United States v. Estevez, 645 F.Supp. 869, 872 (E.D.Wis. 1986).)

Therefore, amicus curiae believes that if this Court should hold that the legitimate institution of forfeiture proceedings, in rem or in personam, implicates the Sixth Amendment, then the effective application of federal and California's asset forfeiture provisions will be seriously jeopardized and our efforts against narcotics trafficking severely undermined.

SUMMARY OF ARGUMENT

The right to counsel of choice is qualified in the first instance by the availability of legitimate means to secure counsel. The seizure or restraint of property subject to forfeiture serves a vital public interest which justifies preventing use of the property for any purpose. The restraint of property subject to forfeiture has only an incidental, non-arbitrary impact on the right to counsel of choice, indistinguishable from a host of

other circumstances. Accordingly, there is no need to weigh or balance the interests at stake. Seizure and forfeiture of criminally tainted property does not implicate the right to counsel of choice because property subject to forfeiture does not constitute the legitimate means to pay counsel. The Due Process Clause of the Fifth Amendment does not require that the "balance of forces" between the government and the accused be equalized with criminally tainted property.

ARGUMENT

THE SIXTH AMENDMENT QUALIFIED RIGHT TO COUNSEL OF CHOICE AND THE FIFTH AMENDMENT DUE PROCESS CLAUSE ARE NOT IMPLICATED BY THE LEGITIMATE INSTITUTION OF FORFEITURE PROCEEDINGS

The Court has the benefit of a great deal of both judicial and academic scholarship treating the consequence of forfeiture on the qualified right of counsel of choice. In addition to the decisions of the Fourth and Second Circuits

in the Caplin & Drysdale, Chartered and Monsanto cases, respectively, the Fifth, Seventh, Eighth and Tenth Circuits have rendered decisions touching on this issue. (United States v. Jones, supra, 837 F.2d 1332 [5th Cir.]; United States v. Thier, 801 F.2d 1463 (5th Cir. 1986), modified 809 F.2d 249 (5th Cir. 1987); United States v. Moya-Gomez, supra, 860 F.2d 706 [7th Cir.]; United States v. Unit Number 7 and Unit Number 8, supra, 853 F.2d 1445 [8th Cir.]; United States v. Nichols, 841 F.2d 1485 (10th Cir. 1988).) The academic literature is gathered and categorized in United States v. Nichols, supra, 841 F.2d at 1490-1491, n. 3.

Amicus curiae can add little to the chorus of thoughtful analysis offered by these courts and commentators. We submit brief in an effort to broaden the perspective in which the constitutional issues will be discussed. Secondly, we are

concerned that in the whirlwind of controversy which characterizes the constitutional question the deteminative issue may be obscured.

The Fourth Circuit reached, we submit, the correct conclusion when it held that "[f]orfeiture, in our view, is another of those events that may prevent a defendant from choosing his counsel but does not involve any denial of the qualified right to counsel of choice". (Caplin & Drysdale, Chartered, supra, 837 F.2d at p. 645.) However, it was the Tenth Circuit which best framed the issue when that court noted that the qualified right to counsel is implicated "only if the defendant has a constitutional right to use assets subject to forfeiture", in the first instance. (United States v. Nichols, supra, 841 F.2d at p. 1505.)

The line of this Court's jurisprudence beginning with Powell v. Alabama,

267 U.S. 45 (1932) and leaving off most recently with Wheat v. United States, ___ U.S. ___, 108 Sup.Ct. 1692, 100 L.Ed.2d 140 (1988) has established that the Sixth Amendment right to counsel begins and ends with a guarantee of an effective advocate. As regards the subordinate and qualified right to counsel of choice, this Court observed "A defendant may not insist on representation by an attorney he cannot afford . . .." (Id., ___ U.S. at p. ___, 108 Sup.Ct. at p. 1697, 100 L.Ed.2d at p. 149.)

That the qualified right to counsel of choice is limited by the legitimate means to employ counsel has been presupposed by a number of courts. (Wilson v. Mintzes, 761 F.2d 275, 280 (6th Cir. 1985) ["when an accused is financially able to retain an attorney, the choice of his counsel to assist rests ultimately in his hands."]; United States v. Lewis, 759

F.2d 1316, 1326 (8th Cir. 1985) ["The Constitution recognizes solvent defendants' interest in retained counsel."]; United States v. Ray, 731 F.2d 1361, 1365 (9th Cir. 1984) ["This Court has recognized that individuals who can afford to retain counsel have a qualified right to obtain counsel of their choice."]; Linton v. Perini, 656 F.2d 207, 209 (6th Cir. 1981) ["a defendant [may] select his own counsel at his own expense."]; United States v. Burton, 584 F.2d 485, 489 (D.C.Cir. 1978) ["An accused who is financially able to retain counsel must not be deprived of the opportunity to do so."]; United States v. Inman, 483 F.2d 738, 739-740 (4th Cir. 1973) [the courts have recognized the right of "any accused, if he can provide counsel for himself by his own resources or through the aid of his family or friends, to be represented by the attorney of his choosing."]; People v. Holland, 23 Cal.3d

77, 86, 151 Cal.Rptr. 625, 630, 588 P.2d 765, 770 (1978) ["a defendant financially able to retain an attorney of his own choosing can be represented by that attorney . . . using any legitimate means within his resources . . .."]

Conceding that the right to counsel of choice is subject to the "harsh reality that the quality of a defendant's representation frequently may turn on his ability to retain the best counsel money can buy" (Morris v. Slappy, 461 U.S. 1, 23 (1983) (Brennan, J. concurring)) and that every defendant is guaranteed competent counsel by appointment if necessary (Gideon v. Wainwright, 372 U.S. 335 (1963)) the Sixth Amendment jurisprudence applicable in these cases ends. Contrary to the analysis of a number of the Circuit Courts, we do not believe any balancing or weighing of interests is therefore required. The defendant should not be heard to bargain

with property (criminally tainted) in which the state recognizes no private title. The only question which remains is whether the government may constitutionally restrain the use of property which is alleged to be subject to forfeiture regardless of the intended or desired use for that property. The answer must be unequivocally yes.

Whether justified as protecting the government's interest in property which ultimately will be forfeited to it and preventing the dissipation of that property during pendency of the forfeiture proceeding (see, Caplin & Drysdale, Chartered, supra, 837 F.2d at pp. 643-646) or on the basis of the "relation back" rule which vests title to an asset in the government at the time of the offense (see, United States v. Nichols, supra, 841 F.2d at pp. 1499-1501), the government clearly has the right to restrain and prevent the dissipation of property alleged to be

subject to forfeiture during the pendency of the forfeiture proceedings.

> "The government's interest in the tainted property arises from the government's power to regulate illegal activities. More specifically, the government has an interest in regulating the means and fruits of illegal activity. Laws defining contraband are one example of congressional power to create a governmental interest in property involved in criminal activity." (United States v. Nichols, supra, 841 F.2d at p. 1500.)

This Court has twice held that the governmental interest underlying the forfeiture statutes justifies the seizure and restraint of a person's property without a prior judicial determination that the seizure is justified, to say nothing of the ultimate question which is whether the property is forfeit to the government. (United States v. $8,850 in U.S. Currency, 461 U.S. 555, 562 (1983); Calero-Toledo v. Pearson Yacht Leasing Company, 416 U.S. 663, 680-681 (1974).)

"Pearson Yacht clearly indicates that due process does not require federal Customs officials to conduct a hearing before seizing items subject to forfeiture. . . . The government interests found decisive in Pearson Yacht are equally present in this situation: the seizure serves important government purposes; a preseizure notice might frustrate the statutory purpose; and the seizure was made by government officials rather than self-motivated private parties." (United States v. $8,850 in U.S. Currency, supra, 461 U.S. at 562, n. 12.)

Outside the forfeiture context, this Court has sanctioned other types of pretrial restraints which are found to serve the public interest. Accordingly, just as the government may restrain liberty to prevent the flight of a suspect (Bell v. Wolfish, 441 U.S. 520, 534 (1979)) or to protect the community from further criminal deprivations (United States v. Salerno, ___ U.S. ___, 107 Sup.Ct. 2095, 95 L.Ed.2d 697 (1987)), so, too, may the government seize and otherwise restrain assets which are subject to forfeiture to prevent the

dissipation of those assets or their further use for illicit purposes. Similarly, a court may inquire into the source of bail (see, United States v. Nebbia, 357 F.2d 303, 304 (2d Cir. 1966)), and assure itself that bail is not from an illegitimate source (see, United States v. DeMarchena, 330 F.Supp. 1223, 1226 (S.D.Cal. 1971)). Thus, illgotten gains will not be accepted in exchange for pretrial liberty.

Such pretrial deprivations of liberty or property must, however, be imposed in accordance with the requirements of due process. Although not raised in either of the two cases before the Court, amicus curiae believes that a defendant is entitled to a reasonably prompt post seizure or restraint hearing in which the government should be required to show probable cause to believe that the property is subject to forfeiture if the defendant

claims and establishes an important need for the property, i.e., to employ counsel. (United States v. Moya-Gomez, supra, 860 F.2d at 726-730; United States v. Unit Number 7 and Unit Number 8, supra, 853 F.2d at pp. 1449-145.)

The restraint of property which is subject to forfeiture serves "the public interest in preventing continued illcit use of the property and enforcing criminal sanctions" (Calero-Toledo v. Pearson Yacht Leasing Company, supra, 416 U.S. at p. 679). Manifestly, such restraint has only an incidental and nonarbitrary impact on the qualified right to counsel of choice not unlike the other vagaries of economic life. Therefore, there is no call to balance the government's interest in the restraint of assets against a defendant's right to choose counsel because that right is qualified in the first instance by the availability of legitimate resources to pay

counsel. Simply stated, the forfeiture of criminal related property does not invade the recognized right to counsel of choice.

Equally, the Fifth Amendment Due Process Clause is not implicated by the restraint and forfeiture of tainted property. The "balance of forces between the accused and his accuser" (Wardius v. Oregon, 412 U.S. 470, 474 (1973) is implicated only if this Court is prepared to recognize that a criminal defendant has a right to use his ill-gotten gains to defend himself, or if it can be shown that the prosecution improperly instituted forfeiture proceedings in a deliberate effort to strip a defendant of his legitimate resouces. In the first instance, it beggars reason to believe that this Court would recognize a constitutional right to use and enjoy the proceeds of criminal activity. Second, nothing in the cases before the Court

suggest any impropriety in the targeting of the property for forfeiture. Furthermore, the mere possibility of abuse is hardly sufficient to declare a statutory scheme unconstitutional as violative of the Due Process Clause. United States v. Nichols, supra, 841 F.2d at p. 1508.)

* * *

CONCLUSION

The restraint of property alleged to be subject to forfeiture does not implicate the qualified right to counsel of choice nor does it offend the Due Process Clause of the Fifth Amendment as respects the balance of powers between the government and the accused. Accordingly, the decision of the Second Circuit en banc in Monsanto should be reversed and the decision of the Fourth Circuit en banc in Caplin & Drysdale, Chartered should be affirmed.

DATED: February 1, 1989

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CERTIFICATE OF SERVICE BY MAIL

No. 88-454 & 87-1729

UNITED STATES OF AMERICA, PETITIONER,

v.

PETER MONSANTO

CAPLAIN & DRYSDALE, CHARTERED, PETITIONER

v.

UNITED STATES OF AMERICA

GARY W. SCHONS, a member of the Bar of the Supreme Court of the United States, states:

That his business address is 110 West A Street, Suite 700, San Diego, California 92101; that on February 3, 1989, he caused to be served a true copy of the attached Brief of the State of California, as Amicus Curiae in the above-entitled matters, on counsel for petitioners and counsel for respondents by placing same in an envelope addressed as follows:

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Said envelope was then sealed and deposited in the United States mail at San Diego, California, with the postage thereon fully prepaid.

GARY W. SCHONS
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Subscribed and sworn to before me this 3rd day of February, 1989.

Notary Public in and for said County and State

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
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CLERK

NO. 87-1729 and NO. 88-45

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987
CAPLAN & DRYSDALE, CHARTERED,
PETITIONER
v.
UNITED STATES OF AMERICA,
RESPONDENT

October Term, 1988
UNITED STATES OF AMERICA
RESPONDENT
v.
PETER MONSANTO
PETITIONER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE UNITED STATES OF AMERICA

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NO. 87-1729 and NO. 88-454

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PETITIONER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE

FOURTH CIRCUIT SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE UNITED STATES OF AMERICA

Amicus Curiae, the Appellate Committee of the California District Attorneys Association, and Ira Reiner, District Attorney of Los Angeles County, are filing this brief accompanied by the written consent of all parties to the above consolidated cases pursuant to Rule 36(2), RULES of the SUPREME COURT of the UNITED STATES.

INTEREST OF AMICUS CURIAE

The Appellate Committee of the California District Attorneys Association is a committee created by the district attorneys of California. It was organized in order to utilize and coordinate the resources of the offices of district attorneys throughout the State, for the purpose of presenting their views on behalf of the People of the State of California in cases which may have major statewide impact upon the prosecution of criminal offenses. Upon review of the instant matter, the Committee has decided to file an *amicus curiae* brief herein. The Office of the District Attorney of the County of Los Angeles is an authorized law officer of the County, which is a political subdivision of the State of California. *See* Rule 36(4).

In California, a civil forfeiture statute applicable to drug trafficking is in effect. CALIFORNIA HEALTH and SAFETY CODE, §§ 11470 *et seq.* (West 1989). There is no requirement that there be a related criminal action. *Id.*, § 11484.4, subd.(i). However, the issue of forfeiture may be tried in conjunction with the criminal action, but upon motion of either the defendant-claimant or the prosecution, the forfeiture hearing can be continued until after the criminal charge has been resolved. *Id.*, §§ 11484.4, subd.(i); 11488.5, subd.(e). The Attorney General of the State of California or the District Attorney of the county involved is responsible for the filing and maintaining of asset forfeiture proceedings. *Id.*, § 11488.l. If a forfeiture petition is filed, a defendant in an underlying or related criminal action who is a claimant in the forfeiture proceeding is entitled to move, unless he has already pleaded guilty or nolo contendere, for the return of the seized assets upon the ground that probable cause is lacking to believe they are subject to forfeiture. *Id.*, § 11484.4, subd.(g)(2). Similarly, where there is no underlying or related criminal action, a claimant is entitled to a probable cause determination no sooner than 10 days after a forfeiture petition is filed. *Id.*, §

11484.4, subd.(g)(1). Moreover, where a forfeiture petition has been filed with respect to unseized assets, the prosecuting attorney may seek protective orders. However, such protective orders (except a temporary restraining orders) may issue only after notice and hearing. It must be determined that there is probable cause to believe they are properly forfeitable. *Id.*, §§ 11484.4, subd.(b); 11492, subd.(b).

The California Court of Appeal held in *People* v. *Superior Court (Clements)*, 200 Cal.App.3d 491, 246 Cal.Rptr. 122 (1988), that the constitutional right of counsel in a criminal case is not violated by denial of access to seized assets pending forfeiture proceedings. The court noted that there was statutory provision for a defendant to move for the return of seized assets upon the ground that probable cause to believe such assets were forfeitable was lacking.[1]

Clearly, the Association and its membership have a vital interest in urging this Court to hold that the constitutional right to counsel in a criminal case does not require that assets otherwise subject to forfeiture are exempt to the extent needed to pay legitimate attorney fees.

---

1. CALIFORNIA HEALTH and SAFETY CODE § 11484.4, as it then read, did not require that a forfeiture petition be pending when the defendant in the criminal action is entitled to make a motion for return of property upon the ground of a lack of probable cause to believe the item seized is forfeitable. *People* v. *Superior Court (Clements)*, *supra*, 200 Cal.App.3d at 495 n. 3.

SUMMARY OF ARGUMENT

The basic issue in these cases is whether a defendant in a criminal case is entitled to have access to his property, which has been seized or otherwise detained by the government pending a forfeiture proceeding, in order to pay legitimate attorney fees. We contend that a defendant should not have access to such property at least where there has been a judicial determination that there is probable cause to believe that the property in question will ultimately be forfeited.[2] A defendant has no more right to pay a lawyer with what is believed upon probable cause to be the proceeds of criminal activities than with what is believed upon probable cause to be stolen property.

It is well settled that the interest of a person in his liberty is not unconstitutionally denied when he is subject to significant pretrial restraint where there has been a judicial determination that there is probable cause to support his detention. Similarly, the interest of a person in his property should not be deemed to be unconstitutionally denied when such property is subject to significant pretrial restraint where there has been a judicial determination that there is probable cause to support such restraint.[3]

---

2. We understand that both the petitioner in *Caplan & Drysdale* and the respondent in *Monsanto* urge that the Sixth Amendment is violated by denial of access to seized assets in order to pay a defendant's attorney fees whether or not a pretrial probable cause determination as to forfeitability is authorized by federal statute.

3. We do not mean to imply that a probable cause determination that a defendant's property is ultimately forfeitable is constitutionally required by the Sixth Amendment. It is simply unnecessary for us as *amicus curiae* to urge that point in light of the statutory scheme in California which might be impacted by this Court's decision in the cases at bar.

ARGUMENT

THE CONSTITUTIONAL RIGHT TO COUNSEL IN CRIMINAL CASES IS NOT VIOLATED BY DENIAL OF ACCESS TO SEIZED OR OTHERWISE DETAINED ASSETS FOR THE PURPOSE OF PAYING ATTORNEY FEES AND EXPENSES WHERE THERE HAS BEEN A PRETRIAL PROBABLE CAUSE DETERMINATION THAT SUCH ASSETS ARE SUBJECT TO FORFEITURE

Our position is that the Sixth Amendment right to counsel in a criminal case is not violated by the denial of access to seized or otherwise detained assets for the purpose of paying attorney fees where there has been a judicial probable cause determination that the detained assets are subject to forfeiture.

This Court has held that pre-seizure notice and hearing is not constitutionally required in order for the government to seize an asset used for unlawful purposes and which is subject to forfeiture. *Caldero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) On the other hand, due process of law requires that the delay between the seizure and the initiation of a civil forfeiture proceeding be justified by a balancing test, analogous to that used to determine speedy trial challenges as set forth in *Barker* v. *Wingo*, 407 U.S. 514 (1972). This test involves the weighing of four factors: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. *United States* v. *$8,850*, 461 U.S. 555, 564-565 (1983). In determining what test applies to such delays, this Court explained that "the Fifth Amendment claim here. . . mirrors the concern of undue delay encompassed in the right to a speedy trial." *Id.*, at 564.

Of significance, for our purposes, is the observation by this Court: "The deprivation in *Barker* - loss of liberty - may well be more grievous than the deprivation of one's use of property at issue here. Thus, the balance of the interests which depends so heavily on the context of the particular situation, may differ from a situation involving the right to a speedy trial." *Id.*, at 565 n. 14.

The *dictum* in *United States* v. *$8,850*, that the "deprivation in *Barker* - loss of liberty - may well be more grievous than the deprivation of one's use of property at issue here" (461 U.S. at 565 n. 14), suggests the proper analysis which permits resolution of the Sixth Amendment issues raised in *Caplan & Drysdale* and *Monsanto*.

In *Gerstein* v. *Pugh*, 420 U.S. 103, 118-119 (1975), this Court confirmed the rule that a judicial hearing is not a prerequisite to prosecution by information. However, this Court held in *Gerstein* that a person arrested and held for trial under a prosecutor's information is constitutionally entitled to a judicial determination of probable cause for pretrial restraint of liberty, specifying that an adversary hearing is not required. In so doing, this Court acknowledged that "[t]o be sure, pretrial custody may affect to some extent the defendant's ability to assist in preparation of his defense." *Id.*, 420 U.S. at 123. Replying to the objection that "the Court's choice of the Fourth Amendment as the rationale for decision and suggests that the Court offers less protection to a person in jail than it requires in certain civil cases" (*id.*, 420 U.S. at 125 n.27), the Court succinctly explained:

> Here we deal with the complex proceedures of a criminal case and a threshold right guaranteed by the Fourth Amendment. The historical basis of the probable cause requirement is quite different from the relatively recent application of variable procedural

> due process in debtor-creditor disputes and termination of government-created benefits. The Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between individual and public interests always has been thought to define the "process that is due" for seizures of person or property in criminal cases, including the detention of suspects pending trial.

Ibid.

Subsequently, in *Baker* v. *McCollan*, 443 U.S. 137, 143 (1979), this Court confirmed: "Since an adversary hearing is not required [for the probable cause determination with respect to any significant pretrial restraint of liberty], and since the probable-cause standard for pretrial detention is the same as that for arrest, a person arrested pursuant to a warrant issued by a magistrate on a showing of probable cause is not constitutionally entitled to a separate judicial determination that there is probable cause to detain him pending trial." [Fn. omitted. Bracketed matter inserted.]

This Court wisely recognized in *Gerstein* "that state systems of criminal procedure vary widely [and that] [t]here is no single preferred pretrial procedure, and the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole." *Id.*, 420 U.S. at 123.

The California Court of Appeal approved the statutory scheme, authorizing a pretrial judicial determination of probable cause to detain property subject to forfeiture notwithstanding a defendant's Sixth Amendment claims, in *People* v. *Superior Court (Clements)*, *supra*, precisely upon the ground that "[p]retrial deprivation of liberty or property on a showing of probable cause is not an unknown means of securing a compelling interest." *Id.*, 200 Cal.App.3d at 500.

If, as *Gerstein* teaches us, a defendant is constitutionally entitled to no more than a probable cause determination in order to justify his continued custody or subjection to some other significant restraint pending trial, it must be the case that he is constitutionally entitled to no more than a probable cause determination in order to justify detention of his property subject to forfeiture prior to the forfeiture hearing on the merits.[4]

---

4. 21 U.S.C. § 853(e)(1)(B), which authorizes protective orders prior to the filing of an indictment or information, establishes criteria in addition to probable cause (assuming that probable cause is the equivalent of a "substantial probability that the United States will prevail on the issue of forfeiture") which require balancing of specified interests. Moreover, the hearing contemplated in subsection (e)(1)(B) is adversarial. Similarly, § 853(f), which authorizes warrants for the seizure of forfeitable property, requires in addition to a determination of "probable cause to believe that the property to be seized would, in the event of a conviction, be subject to forfeiture and that an order under subsection (e) of this section may not be sufficient to assure the availability of the property for forfeiture." Interestingly enough, the federal statute requires that a warrant pursuant to subsection (f) must be based upon probable cause, whether or not it is issues before or after the filing of an indictment or information. Subsection (e)(1)(A), which authorizes post-indictment or post-information protective orders, does not expressly require a finding of a "substantial probability that the United States will prevail on the issue of forfeiture."

It is noteworthy that the *Monsanto* panel majority concluded that notice and an adversarial hearing are constitutionally required where the question of attorney fees is implicated with respect to post-indictment or post-information restraining orders as a matter of Fifth Amendment due process or by virtue of the Sixth Amendment. The government has the burden of establishing the probability that the defendant will be convicted at trial and that the properties in question will be subject to forfeiture. *United States* v. *Monsanto*, 836 F.2d at 82-85 (2d Cir. 1988), *rev'd*. 852 F.2d 1400 (2d Cir.1988), *cert. granted*, No. 88-484 (Nov. 7, 1988).

CONCLUSION

The Sixth Amendment does not entitle a defendant to more than a pretrial probable cause determination as to the forfeitability of property seized or otherwise detained for forfeiture proceedings even though the defendant desires access to such property for the purpose of paying attorney fees and expenses.

Respectfully submitted on behalf of the
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BRIEF

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR EUGENE R. ANDERSON, ESQ. AN AMICUS CURIAE IN SUPPORT OF UNITED STATES OF AMERICA*

INTEREST OF THE AMICUS CURIAE

Eugene R. Anderson, Esq., is a lawyer admitted to practice in New York and Massachusetts. He is a member of the Bar of

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this Court. From 1961 to 1965, he was Assistant United States Attorney for the Southern District of New York, serving as Chief of the Civil Division from 1963 to 1965. Mr. Anderson was amicus curiae in *Waste Management of Carolinas, Inc. v. Peerless Insurance Co.*, 315 N.C. 688, 340 S.E.2d 374 (1986). Mr. Anderson has written extensively on the subject of legal fees. See, for example, one *New York Times* article set forth in Appendix A which relates to the subject of these cases.

As a result of his experience in both government and private practice, *amicus* can present a view of the issues in this case that is not presented by either the government, the parties or the other *amici*. Mr. Anderson has carefully reviewed the briefs in these cases filed in the respective Courts of Appeals and believes that the emphasis in this brief on property rights has not been presented to this Court or to the lower courts. This brief argues that the judiciary should not create unprecedented new rights in tainted assets simply because legal fees are involved. The brief also focuses on the public's perception of the legal profession.

SUMMARY OF ARGUMENT

1. Economically successful defendants have no greater constitutional rights than economically unsuccessful defendants. Criminal activity does not vest property rights in those who have wrongfully acquired the property. Forfeiture provisions do not deprive criminal defendants of the use of their legitimate assets to obtain the services of the counsel of their choice. Forfeiture simply prevents defendants from using assets that never belonged to them because the assets were acquired through criminal activity. To exempt legal fees from forfeiture elevates the rights of economically successful RICO and CCE defendants above those of other defendants.

The concept of seizure and forfeiture is well established in the legal system of this country. There are two issues that

distinguish these cases from other seizure and forfeiture cases. First, the statutory provisions involved in these cases strike defendants with substantial tainted assets which can be used to pay legal fees. Second, the victims in RICO cases are so far removed from the defendants as to be easily forgotten in the proceedings.

These cases are actually about property rights and not the rights of accused persons. Establishing an exemption from the forfeiture provisions when legal fees are involved puts the rights of those possessing tainted money and property above the rights of those who have none.

Common law has long established that the fruits of crime do not belong to the criminal. RICO, CCE and CFA did not change the common law; they simply established a mechanism for the disgorgement of illicit fruits. In its opening brief, Petitioner Caplin & Drysdale acknowledges that "nobody" has legal title to the assets. "[N]obody's" assets cannot be used to pay "private" lawyers.

There is no constitutional provision that permits lawyers to share in the ill-gotten gains of criminal defendants they represent. The lawyers in these cases are asking to be lawful beneficiaries of illegal earnings from racketeering enterprises and from organized crime.

2. The Sixth Amendment right to counsel is firmly established. The right to counsel of choice is not absolute. To exercise that right, an individual must have the financial resources with which to do so. Since RICO and CCE defendants have no property rights to the tainted assets, they have no financial resources with which to exercise their right to choice of counsel.

The plight of RICO defendants is being confused with the plight of the lawyers. The problem is lack of legitimate assets. Sympathy for lawyers does not justify special treatment for economically successful RICO defendants.

3. One of the unique features of a RICO case is that there is no victim at the station house. This fact does not call for giving special economic status to the lawyers retained by such defendants. The State of New York has enacted legislation that permits prosecuting attorneys to recover the proceeds of all felonies. If this Court permits lawyers to share in seized assets, it will not only frustrate the will of Congress as expressed in RICO, CCE and CFA, but will also adversely affect the public policy of the State of New York as expressed in its statute.

4. Whether a RICO, or any other, defendant is adequately represented by a public defender or court-appointed lawyer is a separate issue that should be addressed in an *appropriate* case.

5. The public perceives the criminal justice system as being slow, inefficient and favoring the rich and mighty. Vital to a law-abiding society is renewed public confidence in the system.

ARGUMENT

I.

NO PROPERTY RIGHTS ARE VESTED IN CRIMINALS BY CRIMINAL ACTIVITY

Economically successful defendants have no greater constitutional rights than economically unsuccessful defendants. Exempting attorneys' fees from the forfeiture provisions of the Racketeer Influenced and Corrupt Organizations (RICO), 18 U.S.C §1963 (Supp. IV 1986), Continuing Criminal Enterprise (CCE), 21 U.S.C. §848, and Comprehensive Forfeiture Act (CFA), 21 U.S.C. §853, statutes invests property rights in criminal defendants which these defendants do not have. These cases are about property rights, not the constitutional right to counsel in criminal cases. They are about legal economics, not constitutional rights. At issue is the right of the public to deprive criminals of the fruits of crime, not potential prosecutorial misconduct.

Seizures and forfeitures are ingrained in our laws and, equally important, in our culture.[1] Since the days of our Founding Fathers, the United States Customs Service has impounded alleged contraband. Firearms, alcohol and tobacco, to mention just a few of the multitude of products, have been and regularly are, impounded. The warehouses of the United States Customs Service and the vaults of the New York City Police Property Clerk are full. The United States Attorney for the Southern District of Florida probably has more ships impounded than are in many of the world's navies and enough airplanes to start a medium-sized airline.

Pretrial seizure has been ordinary, usual, well-known and well-accepted for generations — long before enactment of the RICO, CCE and CFA statutes.[2] Two things distinguish RICO, CCE and CFA cases. First, these statutory provisions strike "big guys" who can afford to use ill-gotten assets in their possession to pay legal fees. Note carefully, the plea in these cases is not for a "lawyer," but for a "private" lawyer.[3] Second, the defendants in RICO prosecutions are remote from their victims and from their crimes. There is no battered victim at the station house to demand that her purse or his wallet be returned. The victim is the public; it is wrong implicitly to assume that there is no victim at all, and therefore no compelling government interest.[4]

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[1] Opening brief of Respondent, Monsanto, in No. 88-454 (cited herein as "Monsanto Br."), at p. 12. *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), changed procedural rules. It did not change property laws.

[2] *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

[3] Brief of Petitioner, Caplin & Drysdale, Chartered, in No. 87-1729 (cited herein as "C&D Br."), at pp. 10, 11, 39, 42, 45; Monsanto Br. pp. 32, 36, 43, 45.

[4] In his opening brief in No. 88-454, Respondent Monsanto distinguishes proceeds of a bank robery from RICO and CCE proceeds. Stating that because the bank and its depositors are "wrongfully deprived owners" having a "common law right to the return of their property," Respondent claims that "the government has a compelling interest in obtaining . . . return [of the assets]

(Footnote continued)

That these cases are about property and not the Constitution is concisely and eloquently set forth in an "Op-Ed" article which appeared in *The New York Times* of December 30, 1988, a copy of which is set forth in Appendix B, to which the Court's attention is respectfully drawn. (*See also* Queenan, *Rico Strikes Again!*, Barron's Nat'l Bus. & Fin. Weekly, Dec. 12, 1988, at 8.) The indifference to the rights of people characterized by this article underscores the fact that these cases are about property rights and not the rights of accused persons. The decision of the en banc panel of the Fourth Circuit implicitly recognized that the most serious pre-trial deprivation of all – deprivation of liberty – is constitutional.[5] The prospect of "private" legal fees – or the loss thereof – does not justify a change of constitutional principles. If these cases were titled *In re Drexel Burnham Lambert & Co.* they would more clearly illustrate the "non-issues."[6]

To establish an exemption from the forfeiture provisions when legal fees are involved puts the interests of those possessing disputed money and property above the rights of those who have none. It is not a deprivation of constitutional rights to prevent a small-time burglar from using the property he allegedly has stolen to

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that plainly outweighs the robber's claim to use. . .[them] for any purpose, even to hire an attorney." Monsanto Br. p. 37. This concession does not square with Monsanto's earlier contention (Monsanto Br. p. 31) that the right to counsel is among the most fundamental of rights. Where is the line drawn between bank robbers and stock manipulators? The right to counsel is not so fundamental that it permits the use of the fruits of crime to pay lawyers. The plea for medical care for the defendants' children (Monsanto Br. p. 17, citing *United States v. Rogers*, 602 F.Supp. 1332, 1348 (D. Colo. 1985)), while touching, fares no better. Stealing for food, shelter, medical care and lawyers is not condoned. The long and short of the matter is that neither Monsanto nor Reckmeyer ever had common law property rights.

[5] *In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d 637, 643 (1988).

[6] Petitioner in No. 87-1729, Caplin & Drysdale, Chartered, seems to acknowledge that the legal fee issue really pinches because of "white collar" crimes. C&D Br. pp. 35, 44, 45.

pay his defense lawyer. A defendant with available funds can use his assets to post bail rather than to pay legal fees. The bail vs. lawyer dilemma is precisely the same issue as that suggested by Petitioner, Caplin & Drysdale, [hereinafter Petitioner] and Respondent, Monsanto, [hereinafter Respondent] in these cases. No one would contend that court-imposed bail deprives a defendant of constitutional rights because he has chosen pre-trial freedom over a higher-priced lawyer. Following their logic, defendants should be permitted to use disputed assets to post bail.

Does an alleged criminal who is caught reaching into the cash register have a constitutional right to take out just enough to pay a lawyer? Should an accused murderer who is the beneficiary of the victim's life insurance policy be able to demand immediate payment of just enough of the insurance proceeds to pay legal fees? Should a defendant be allowed to travel without bail to Switzerland to withdraw funds from a secret bank account if the money is to be used to pay a lawyer? The answer to all these questions, as it is in the instant cases, is no.

The law routinely permits property held by criminal defendants to be frozen. Tax liens and creditors' liens may tie up assets.[7] A wife seeking a divorce may decide that she, not her husband's lawyer, should get the defendant's assets, and, if she can make the required evidentiary showing, can obtain a court order to prevent her husband from disposing of property. Other "[p]urely private predicaments may leave a defendant without the counsel of his choice."[8]

Regardless of how many times it is said that the government is depriving the defendant of the right to pay a lawyer[9] it does

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[7] *In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d at 646.

[8] *In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d at 645.

[9] C&D Br. pp. 10, 38, 39, 41, 42.

not become true.[10] Defendants who have "undisputed assets" are not deprived of such rights.[11] Defendants with illicit assets do not have any right to those assets and this is not because of anything the government does or does not do. Illicit assets – whether cash or stolen Van Goghs – do not belong to the defendants and cannot be used by defendants. The presence of the government in these cases is irrelevant. The government cannot deprive the defendants of something they do not have. It is not the government that makes a "beggar"[12] of the defendant or renders a defendant "indigent,"[13] it is his or her lack of undisputed assets.[14] This Court should, and must, apply the common law to these cases.[15] RICO, CCE and CFA did not change the common law. As Justice Oliver Wendell Holmes once wrote, "upon this point, a page of history is worth a volume of logic."[16]

Repeated reference to "the defendant's assets" or "his or her assets"[17] *ignores* the facts.

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[10] The potential for prosecutorial misconduct is no more present in these situations than in many others. For example, a prosecutor can grant immunity, decide to indict or not to indict, decide to charge a lesser offense, etc. Even the most aggressive prosecutor cannot pick the lawyer for an indigent defendant nor set the compensation for that lawyer.

[11] *In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d at 645, 646.

[12] C&D Br. p. 12, or "pauper" C&D Br. p. 20.

[13] C&D Br. pp. 19, 41; Monsanto Br. pp. 4, 6, 34-35.

[14] The "purely private predicament" of no legitimate assets was not created by the government as contended by Monsanto. Monsanto Br. p. 35, fn. 19.

[15] "Forced indigency" (C&D Br. p. 23) is a terrible thing, but not as reprehensible as living off the fruits of illicit acitvity.

[16] *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

[17] C&D Br. pp. 11, 12, 24; Monsanto Br. pp. 3, 6, 11, 36, 38, 41, 48.

Petitioner, Caplin & Drysdale, would have this Court believe that the question is a "fiscal" one.[18] It is not. The fruits of crime do not belong to RICO defendants any more than they belong to muggers, bank robbers or stock manipulators.[19] Whether the government makes or loses money is completely irrelevant.[20] Caught in the dilemma of trying to justify a RICO defendant's use of illicit assets, Petitioner Caplin & Drysdale acknowledges that "no[body]" has legal title to the assets. C&D Br. p. 40. *For this reason alone* the Petitioner's sophistry fails. "Nobody's" assets are not the RICO defendants' assets.[21] "Nobody's" assets cannot be used to pay "private" lawyers.[22]

Because the defendants have nothing when they have illicit assets, the argument about equities and "balance of hardships" is a non-starter.[23] Pickpockets do not enjoy such equities and

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[18] C&D Br. p. 28.

[19] *In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d at 645. Petitioner in No. 87-1729, Caplin & Drysdale, Chartered, contends that since lawyers have "historically" been permitted to receive tainted assets they should be permitted to continue to do so. C&D Br. p. 45. The argument for the continuation of the practice boils down to "Two Wrongs Make a Right."

[20] Petitioner's concern for the resource needs of "public defenders" (C&D Br. pp. 33-34, 45), while commendable, is a different issue for a different case.

[21] Respondent Monsanto, in No. 88-454, asserts that RICO and CCE defendants have "colorable" title to the questioned assets. Monsanto Br. p 37. But whatever color there is to the title is extinguished when the defendant is convicted. The assets are then not "taken away," but are merely proven not to have belonged to the defendant after all. Preconviction there is, at best, a procedural issue. *Fuentes*, 407 U.S. 67.

[22] Minimizing the government's interests as "merely those of the United States" (*In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d at 646) does not exalt the defendant's possessory interest to the status of ownership.

[23] C&D Br. p. 15.

neither should RICO defendants.[24] Some lower courts have been drawn into a morass that will involve the courts in hearings akin to matrimonial proceedings to determine the amount of support a spouse and children should receive.[25] Take these cases out of the realm of high finance and the issues vanish. The "hardship" plea is completely devoid of substance because the defendants have absolutely no "right" to use illicit assets for any purpose whatsoever. The entire argument boils down to Willie Sutton's justification for robbing banks: That is where the money is.

Petitioner Caplin & Drysdale confuses the issue by referring to "defendant's vital interests in having food, shelter, medical care and defense counsel pending trial."[26] This argues for a license to steal, which no defendant – no matter how needy – has. The plea for "legitimate living expenses"[27] is nonsense. It is the *source* of the funds, not the *character* of the expenditures, that is in issue.[28] Ivan Boesky's lavish charitable contributions were

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[24] *United States* v. *Monsanto*, 852 F.2d 1400, 1405 (2d Cir. 1988). The word "may" in Section 853(e)(1)(A) should not be read to permit the courts to give the defendant property rights in illicit assets the defendant would not otherwise have.

[25] *Monsanto*, 852 F.2d at 1408-1409.

[26] C&D Br. pp. 8, 12, 19, 20, 25, 26, 27, 30, 32. If the "food, shelter, medical care" plea was made below it apparently escaped the attention of Judge Wilkinson who wrote "no one would argue that the government must allow a defendant to use contested assets to purchase most categories of consumable services or goods." *In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d at 644.

[27] C&D Br. p. 9; Monsanto p. 21.

[28] Petitioner, Caplin & Drysdale, Chartered, acknowledges that defendants should not be permitted to make "unlawful expenditures." C&D Br. p. 19.

legitimate; his source of funds was illegitimate.[29] The argument is pure nonsense and it ignores the public's interest.[30]

If the courts are permitted to legitimize expenditures of tainted assets, to whom will persons with claims to those assets look if they can establish a "right, title or interest superior" to the defendant?[31] Petitioner, Caplin & Drysdale, and Respondent, Monsanto, are not seeking a narrow statutory construction; they are seeking an unprecedented change in our property laws. The Court should not cleanse tainted assets even though they are going to pay a lawyer. If the courts give "permission" to use assets (Monsanto Br. p. 30, fn. 15) with no provision for "recapture," the courts will both create new property rights where none have heretofore existed and deprive the legitimate owners, if any, of their rights.

There is no constitutional provision permitting lawyers to share in the ill-gotten gains of criminal defendants they represent. In these cases lawyers are asking to be lawful beneficiaries of illegal earnings from racketeering enterprises and from organized crime. No other segment of our society would dare publicly to ask for a share of the "take" from criminal activity.

II.

THESE CASES DO NOT RAISE A SIXTH AMENDMENT ISSUE

The Sixth Amendment right to counsel begins and ends with *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) and the cases cited in *In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d 637, 643.

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[29] Judge Winter in *Monsanto*, 852 F.2d at 1408, confused "ordinary lawful expenditures" with the use of fruits of crime.

[30] The plea for just a little bit of the illicit assets (C&D Br.pp. 23-24, 41-42) fares no better. The public has an overwhelming interest in depriving all defendants – RICO defendants and accused bank robbers – of illicit assets. Permitting just a little use of tainted assets puts the courts on a slippery slope.

[31] Monsanto Br. p. 13.

No amount of hair-splitting or searching to see "how many angels can dance on the head of a pin" should be permitted to confuse or obscure the constitutional principle set forth in *Gideon*. Respondent in No. 88-454, Monsanto, concedes that ". . . the right to counsel of choice may not be absolute, and may depend on the financial resources of the individual who seeks to exercise it . . ." Monsanto Br. p. 32. Since RICO and CCE defendants have no property right to the tainted assets, they are in exactly the same position as defendants who do not have the financial resources to exercise their right to choice of counsel.

Petitioner, Caplin & Drysdale, and Respondent, Monsanto, have made an implicit assumption that the manufactured conundrums in these cases are of someone else's making, e.g. that RICO defendants are innocent bystanders caught between the American Bar Association and the Constitution[32] or that lawyers cannot be bona fide purchasers for value.[33] Lawyers can ethically take credit risks and, in fact, go further sometimes, taking an assignment of bail money thus assuming the risk that the defendant will flee.

The proposed American Bar Association Model Codes of Professional Responsibility and Professional Conduct do not have a constitutional dimension.[34] Petitioner Caplin & Drysdale moves with ease from the proposition that RICO defendants should not be punished to the proposition that lawyers should not be punished. (C&D Br. p. 31; Monsanto Br. p. 23). It is not "punishment" (C&D Br. pp. 25, fn. 13, 40; Monsanto Br. p. 37, fn. 20) to leave a RICO defendant without assets he or she does not legitimately own. There is no issue in the cases about punishment of lawyers; it is a red herring.

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[32] C&D Br. p. 36.

[33] C&D Br. p. 31.

[34] Ethical problems (C&D Br. p. 35) are exacerbated, not solved, by permitting lawyers to be paid from illicit assets.

Having placed RICO defendants in a helpless and hapless situation, their advocates then look to the courts to bail them out. The problem in these cases is no "legitimate assets." The court has already solved that problem as to *all* indigent defendants.

In addition, the plight of RICO defendants is being confused with the plight of the lawyers. Of course, there is sympathy for a lawyer who takes a bum check, but so is there sympathy in that situation for "doctors" and "grocers."[35] Caplin & Drysdale, Chartered, was victimized by Mr. Reckmeyer, who was somewhat aided by their view that an "historic" practice exists permitting criminal defense lawyers to accept tainted assets.[36] Genuine sympathy for victims such as Caplin & Drysdale does not entitle the legal profession to special treatment.

Lawyers are not unique in that they are not bona fide purchasers.[37] Pawnbrokers are similarly situated. The problem is not created by RICO, CCE and CFA, but would exist even without those statutes. It is a problem of no "legitimate assets."[38] It does not justify special treatment for RICO defendants.

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[35] C&D Br. p. 30.

[36] C&D Br. p. 45. Petitioner Caplin & Drysdale argues for a presumption that legal fees in RICO cases are being paid from tainted assets. There should be no such presumption. The statute requires some level of knowledge. It is wrong to say that criminal lawyers can never be paid because of this presumed guilty mind. Petitioner and Respondent are asking this Court to rule that there is no Constitutional way for the Legislature to say that no one can get property rights in tainted assets if the result of such legislative action impacts legal fees.

[37] C&D Br. pp. 31, 34.

[38] *In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d at 645.

III.

THE ABSENCE OF A "SPECIFIC" VICTIM IN RICO CASES SHOULD NOT ACCORD SPECIAL TREATMENT FOR RICO DEFENDANTS

The victims of crimes underlying RICO prosecutions are frequently numerous, unknown, nameless and faceless. The defendants are remote from their crimes physically and temporally. The victim of a street mugging is sufficiently "real" to make it unthinkable that the alleged mugger could use the contents of the victim's wallet to pay a lawyer.[39] A distinguishing feature of RICO is that there is no victim at the station house. This fact does not serve to distinguish RICO defendants from others. It certainly does not call for giving special economic status to the lawyers retained by such defendants.

The State of New York has enacted legislation, N.Y. Civ. Prac. L. & R. Art. 13-A (McKinney Supp. 1989), to permit prosecuting attorneys to recover the proceeds of all felonies. *(See, Kuriansky v. Bed-Stuy Health Care Corp.*, 135 A.D.2d 160, 525 N.Y.S.2d 225 (N.Y.A.D. 2 Dept. 1988), *aff'd*, ____ N.Y.2d ____, ____ N.E.2d ____ (Nov. 22, 1988) where the court allowed the state to freeze defendants' assets alleged to have been obtained through Medicaid fraud; *Morgenthau v. Citisource, Inc.*, 195(85) N.Y.L.J., May 6, 1986, at 13, col. 3T (N.Y. Sup. Ct. May 5, 1986)(not officially reported), *rev'd*, 121 A.D.2d 353, 504 N.Y.S.2d 108 (N.Y.A.D. 1 Dept., 1986), *rev'd*, 68 N.Y.2d 211, 508 N.Y.S.2d 152, 500 N.E.2d 850 (1986), *aff'd on remand*, 128 A.D.2d 459, 513 N.Y.S.2d 429 (N.Y.A.D. 1 Dept., 1987) where the New York County District Attorney was permitted

[39] *See, District Attorney of Queens County v. McAuliffe*, 129 Misc.2d 416, 493 N.Y.S.2d 406 (1985), in which the defendants had extorted $150,000 from an 84-year-old widow. Following arrest, only $85,000 in cash and property remained of the total sum extorted and the court granted a preliminary injunction preventing use of the assets, citing the substantial likelihood that there would be nothing left of the assets to restore to the victim if there was a conviction.

to freeze assets which were alleged to have been obtained through fraud, bribery and corruption upon a showing of a "substantial probability" of successful prosecution.)

A decision by this Court on constitutional grounds permitting lawyers to share in seized assets would not only frustrate the will of Congress as expressed in RICO, CCE and CFA, but also adversely impact the public policy of the State of New York as expressed in its statute.[40]

IV.

THE ADEQUACY OF COURT-APPOINTED COUNSEL TO PROVIDE THE CONSTITUTIONAL GUARANTEE OF A FAIR TRIAL IS A SEPARATE ISSUE THAT SHOULD BE ADDRESSED, IF AT ALL, AS TO ALL INDIGENT DEFENDANTS IN AN APPROPRIATE CASE

Petitioner and Respondent argue that depriving a RICO defendant of the opportunity to retain counsel of his choice with "experience, talent and investigative resources"[41] seriously undermines his ability to defend himself. They do not extend their plea to those RICO defendants who are economically unsuccessful. If representation by a public defender or court-appointed lawyer is inadequate for RICO defendants, that is a separate issue that should be addressed by the Court in an appropriate case. If RICO defendants are entitled to a better defense than presently provided by public defenders,[42] then so too are indigent defendants in other cases.

[40] The State of California has a statute even more similar to the federal statutes, Cal. Health & Safety Code § 11470. In *People v. Superior Court*, 200 Cal. App. 3d 491, 246 Cal. Rptr. 122 (1988), the court upheld the constitutionality of the statute.

[41] C&D Br. p. 11.

[42] C&D Br. p. 44.

Alleged inadequacies of public defenders and court-appointed counsel are not grounds for giving special treatment to defendants who are in possession of substantial amounts of property when arrested.

The adequacy of counsel is not a decision this Court should make in the abstract. There should be no general presumption that *all* public defenders are inadequate. To do so would open the floodgates for appeals alleging inadequate representation by defendants represented by public defenders. The Court should only judge the adequacy of counsel in a case in which an identified client has received or is threatened with receiving inadequate representation.[43]

Petitioner charges that the adversarial process – necessary to prevent abuse by the government – would be seriously threatened by preventing lawyers from taking payments from allegedly illegal assets. The implication is that the adversarial process need not be safeguarded for those who cannot afford high-priced lawyers. These cases are not appropriate cases in which to decide questions related to the adequacy of court-appointed counsel or the "imbalance of powers between the government and criminal defendants."[44]

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[43] The Fourth Circuit noted the fact that "[t]here exist no grounds for a constitutional presumption of incompetence on the part of appointed counsel" (citing *United States v. Cronic*, 466 U.S. 648 (1984)). Rather, the Court suggested that "[i]n a specific case in which a defendant receives ineffective assistance at trial, he can challenge his conviction on that well-established basis" (citing *Cronic, supra; Strickland v. Washington*, 466 U.S. 668 (1984)). *In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d at 647. Neither party has done so here. While Respondent Monsanto in No. 88-454 moved for a mistrial in his criminal trial, that motion was based upon the ruling by the Second Circuit "that he had been deprived of his right to retain private counsel out of the assets restrained by the government (Tr. 14224-44)." Monsanto Br. p. 10.

[44] C&D Br. p. 43.

V.

LAWYERS SHOULD NOT BE PRINCIPAL AND LAWFUL BENEFICIARIES OF ILLEGAL GAIN FROM RACKETEERING ENTERPRISES AND FROM ORGANIZED CRIME

The criminal justice system is in a sorry state. The public perceives it as being slow, inefficient and favoring the rich and mighty. Vital to a law-abiding society is renewed public confidence in the system.

If lawyers are widely perceived to be partners in crime with those they are defending, the system will be even further corrupted. The Fourth Circuit recognized this, stating in its *en banc* opinion that "[p]ublic confidence in the administration of justice might be a casualty of exempting attorneys' fees from forfeiture. Public cynicism and distrust of the legal system might grow as citizens watch huge sums of cash being seized in drug raids and then flowing straight into the pockets of lawyers under a claim of constitutional special privilege." *In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d at 649.

From a public policy standpoint, the public must be convinced that the system is fair and applies equally to all citizens. Lawyers, officers of the court, must be seen to be supporting the administration of justice. The profession should not be perceived as pleading for special treatment for a very narrow class of defendants; a class distinguished from other defendants solely because it has the capacity to use allegedly tainted assets to pay substantial legal fees.

If the public sees special treatment accorded not only to the wealthy, but also to those involved in organized crime activities, it will lose its already shaky confidence in the American criminal justice system.

CONCLUSION

In No. 87-1729, *Caplin & Drysdale, Chartered*, the decision of the Court of Appeals for the Fourth Circuit *en banc* should be affirmed.

In No. 88-454, *Peter Monsanto*, the decision of the Court of Appeals for the Second Circuit *en banc* should be reversed.

Respectfully submitted,

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February 22, 1989

APPENDIX A

APPENDIX A

Title: Use Tainted Cash to Pay Lawyers?

Author: Eugene R. Anderson

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Date: Tuesday, March 8, 1988

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No constitutional provision permits lawyers to share in the ill-gotten gains of the criminal defendants they represent. That simple, straight forward proposition should be self-evident.

Yet many defense lawyers and even bar associations, including the Association of the Bar of the City of New York, have asserted that prosecutors and courts should not be able to use two Federal laws, the Racketeer Influenced and Corrupt Organizations Act and the Comprehensive Forfeiture Act of 1984, to freeze a defendant's assets that may have been received illegally. The reason: Defense lawyers want to make first claims on the money to pay their fees.

Moreover, these lawyers say that the constitutional right of every defendant to a lawyer is jeopardized if the Government can freeze allegedly tainted assets. This line of reasoning is a red herring. It is not necessary to use ill-gotten gains to pay lawyers. The right to counsel is a firmly imbedded constitutional principle. Wealthy defendants are entitled to a lawyer – but no better or wiser a lawyer than the penniless are entitled to.

The real issue is the extent to which lawyers can be principal and lawful beneficiaries of illegal earnings from racketeering enterprises and from organized crime.

No other segment of our society would dare to ask publicly for a share of the take from criminal activity. Some defense lawyers, by arguing that they should be paid up front from the allegedly tainted sums, shame the legal profession. They don't want to take the credit risk that their client might not be able to pay them if the client's money is found to have been gotten illegally.

Defense lawyers cannot ethically take cases on a contingent fee basis, but they can take credit risks. Other lawyers, who bring class actions in securities cases and those who take on personal injury cases on a contingent fee basis, are prepared to take the risk of losing millions of dollars on meritorious but ultimately unsuccessful civil cases. In other professions, businessman also take credit risks. It is not unconstitutional to ask criminal defense lawyers to live by the same rules that apply to others.

Freezing a criminal defendant's assets is not a new legal concept. A wife seeking a divorce may decide that she, not her husband's lawyers, should get the defendant's assets, and, hence, obtains a court order preventing her husband from disposing of those assets. For years, the Internal Revenue Service has had the power to stop a defendant from transferring his assets. A defendant could decide to use his assets to post bail rather than to pay legal fees, and no one would suggest that court-imposed bail deprives a defendant of constitutional rights.

Does an alleged criminal who is caught reaching into the cash register have a constitutional right to go ahead and take out just enough to pay a lawyer? Should an accused murderer who is the beneficiary of the victim's life insurance be able to demand immediate payment of the insurance policy to pay legal fees? Should a defendant be allowed to travel without bail to Switzerland to withdraw funds from a secret bank account to pay a lawyer? Should a defendant be allowed to use the courts to sue others in the criminal enterprise who owe him money if the illicit proceeds will go to pay a lawyer?

Fortunately for criminal lawyers, the courts in the United States Court of Appeals for the Second Circuit have permitted the defendant to dip into allegedly tainted funds, but only to the extent of the regular fees established for lawyers who represent indigent defendants. Those fees satisfy our constitutional mandate.

Wealthy defendants do not merit special constitutional protection and neither do economically successful criminals. If court-appointed counsel is not sufficient to provide the constitutional guarantee of a fair trial, then that problem should be addressed. But we don't solve that problem by giving special treatment to defendants who, through illegal means, have gotten their hands on a lot of money.

The criminal justice system is in a sorry state. But if criminal defense lawyers are widely perceived to be partners in crime with those they are defending, then the system will be even further corrupted.

APPENDIX B

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Title: Drexel: Hanged Without a Trial

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You know that old saw about how, as a society, we can't afford to impinge on the constitutional rights of some obvious rat because it could eventually erode the rights of all of us?

How—to cite the most common example—the Government can't censor pornographic magazines because that could be the first step to censoring, say, the *New Yorker*? How our liberties and rights and guarantees as citizens are so fragile that they must be defended at the very fringes of society—at Nazi rallies and mob trials?

Until last week, I never put much stock in that particular saw, seeing it mainly as an example of civil libertarianism gone amok, a Chicken Little theory that denied both reality and common sense.

Then, last week, the giant investment banking firm of Drexel Burnham Lambert settled with the Government on the eve of being indicted. Now everything looks a lot different.

The club the Government used to bludgeon Drexel into submission—causing the firm to ante up to $650 million and plead guilty to six felony counts rather than face indictment—was RICO, the Racketeer Influenced and Corrupt Organization Act.

If "racketeer" conjures up visions of gangsters, if should; although the definition of a racketeer-influenced organization is wonderfully broad, at least from the point of view of an ambitious prosecutor, there is no question that the legislation was intended to put the mob out of business. The argument was made that the Justice Department needed a truly onerous weapon in order to have a chance in the fight against organized crime, and that RICO was that weapon.

How onerous is this law? Extremely. Anyone convicted under the statute faces, in addition to lengthy prison terms, the prospect of triple damages, the forfeiture of all illegal profits (plus interest) and so on. No problem with that, of course; people convicted of serious crimes, whether mobsters or investment bankers, ought to face serious penalties.

No, the problem with RICO is the extraordinary amount of punishment it exacts before anyone is convicted. Merely by bringing the indictment, the Government is allowed to immediately impound all the defendant's significant assets on the grounds that these assets will be turned over to the Government anyway once the guilty verdict is in.

This is an astounding power for prosecutors, for it gives the Government the ability, quite simply, to put a company out of business.

This is not an exaggeration. This past August, the Government brought a RICO indictment against a securities firm called Princeton/Newport Partners. Although prosecutors sought less than $500,000 in illegal profits, they wanted a bond of nearly $24 million! Because, like any securities firm, Princeton/Newport Partners need capital in order to function, the mere fact of the indictment forced it to liquidate.

Remember, now, there has been no trial. Nobody has been found guilty of anything. But the firm is finished, ruined by the financial terms of RICO and the stigma of being labeled a "racketeer."

I do not mean this to be a brief for Drexel. It seems to me quite plausible that the firm committed the crimes it has been accused of. But there is something fundamentally wrong when Drexel's pre-indictment options were either to settle or be put out of business. Getting the chance to fight for its honor in court was never part of the equation. Drexel has already been found guilty—not by a jury but by the United States Attorney.

What is offensive about the law is this: It presumes guilt. In so doing, it violates one of the civil liberties we hold most dear as a society—namely, that we are innocent until proven guilty in a court of law.

RICO makes a mockery of this right. Of course, no one seemed to be bothered by this trampling of basic rights when it was "only" the basic rights of mobsters that were at stake. But now the victims are more "respectable"; consequently, there is growing sentiment that the law should be rewritten by Congress.

Great, except the rewriting the business community has in mind would still allow RICO to trample on the rights of mobsters, while protecting those in the securities industry. One would have hoped that the securities industry would see now that the old saw has some validity after all. First it was mobsters, then securities firms. Who will be next?

Don't rewrite RICO. Abolish it. The Chicken Littles got this one right: When you violate the rights of mobsters, you violate the rights of us all.